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DURING THE

# IMPEACHMENT TRIAL

OF

# Governor William Sulzer

BY


## LOUIS MARSHALL, LL. D.

OF COUNSEL FOR RESPONDENT


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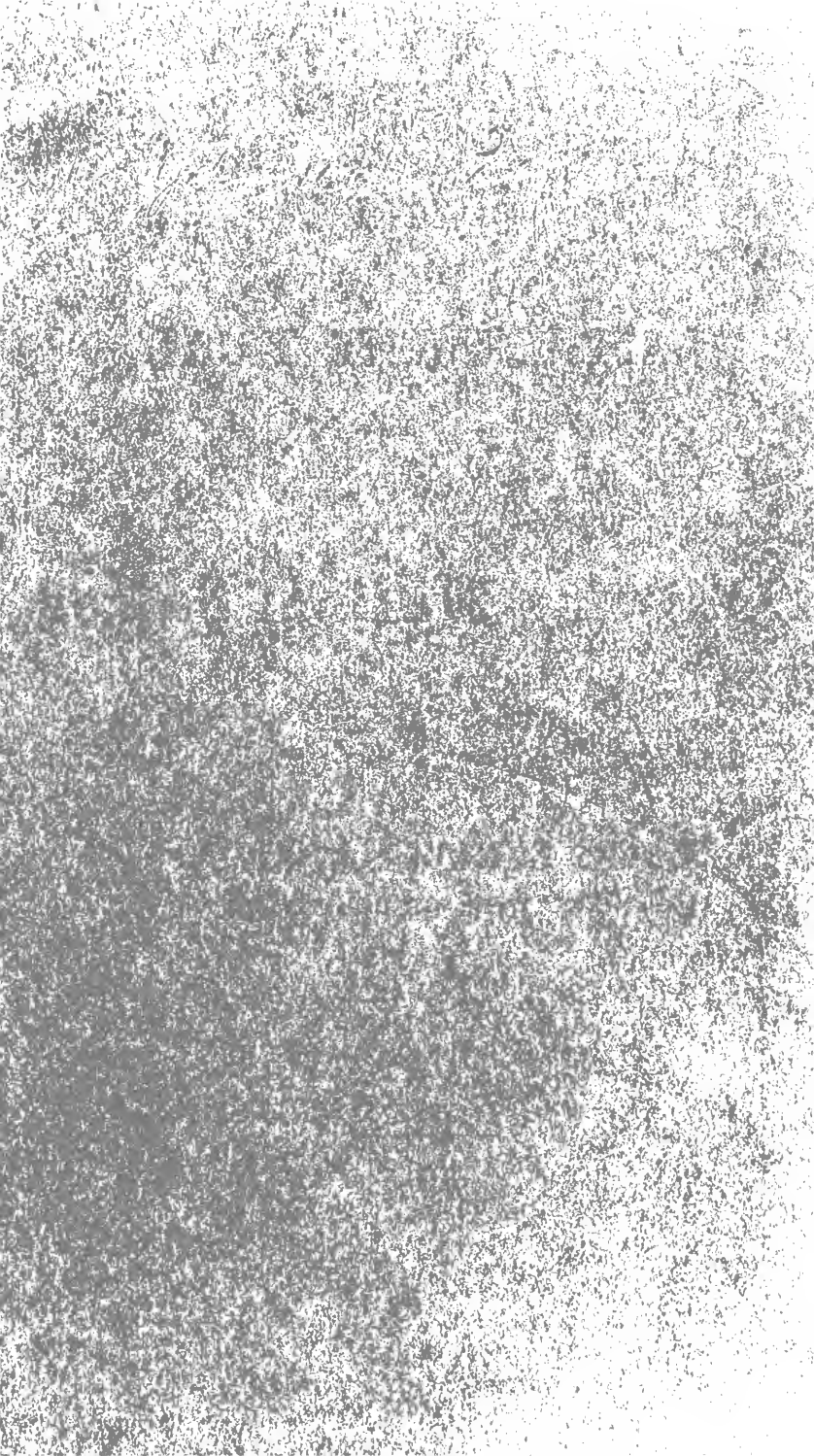

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## Argument on the Jurisdiction of the Court.

May it please the Court: A valid impeachment by the Assembly is a condition precedent to the exercise of jurisdiction by this Court. Without such impeachment by the Assembly, acting in conformity with the constitutional safeguards, there is such an absence of due process of law as will render the proceedings pursuant to which this tribunal has been convoked, a nullity. It has been frequently declared by the highest authorities that an impeachment by the House of Commons, the House of Representatives or the Assembly, is the equivalent of an indictment. The impeaching body acts as the accuser, or, as Blackstone phrases it, as "the grand inquest," and can exercise that function only when it observes the requirements of the organic law and has been set in motion in accordance with its provisions. Hence, if it should appear that it has acted without constitutional authority, or in contravention of the terms and conditions imposed by the Constitution, its action goes for naught and cannot be made the basis of any proceedings before a Court for the Trial of Impeachments. A valid impeachment is an essential prerequisite to the exercise of jurisdiction by the Court.

In the epigrammatic words of Mr. Justice Brown, who but a few days ago died in the fullness of years:

> "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and the evidence." Illinois Central R. R. Co. v. Adams, 180 U. S. 34.

The parallel between an impeachment and an indictment has always been recognized (4 Bl. Com. 259–62 and authorities hereafter cited). It was regarded as complete in the course of the

discussions in the Johnson and Barnard impeachment trials. In the quaint phrase of 1 Hale's Pleas of the Crown 150, quoted by Blackstone (vol. 4, p. 259):

> "But an impeachment before the lords by the commons of Great Britain, in Parliament, is a prosecution of the already known and established law, . . . being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom."

It is, therefore, clear that the decisions relating to the finding of an indictment by a grand jury are of the utmost importance and should be deemed controlling whenever the validity of an impeachment is to be determined.

In Ex parte Bain, 121 U. S. 1, a question very similar to that now to be determined was passed upon by the Supreme Court of the United States. There Bain had been indicted and convicted for having made a false report as the cashier of a national bank. The indictment charged that he had made the report with the intent to deceive an agent appointed by the Comptroller of the Currency to examine the affairs of the association. On motion subsequently made the court ordered the indictment to be amended by striking out the reference to the Comptroller of the Currency. Thereupon Bain made an original application to the Supreme Court for a writ of habeas corpus, urging in support of his application that the court which had convicted had no jurisdiction or authority to try him, since the indictment, as amended, was no longer the indictment of a grand jury. His contention was sustained, the court holding that the declaration in article 5 of the Amendments to the Federal Constitution that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury" was jurisdictional; that no court of the United States had authority to try a person without an indictment or presentment in such cases; that the indictment referred to was the presentation to the proper court under oath, by a grand jury, duly impanelled, of a charge describing an offense against the law for which the party charged might be punished, and that although an indictment had originally been

found by the grand jury, when it was amended there was nothing to which the prisoner could be held to answer, and the indictment being void, there was nothing to try.

The court, after reaching the conclusion that the indictment could not be amended, and quoting the language of Mr. Justice Field in 2 Sawyer 667, in which he said that the grand jury was "an informing and accusing tribunal only," said, at page 12:

> "It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of Jones v. Robbins, 8 Gray 329, 'individual citizens' 'from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury'; and 'in cases of high offences' it 'is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecution.' . . . We are of the opinion that an indictment found by a grand jury was indispensable to the power of a court to try the petitioner for the crime with which he was charged. . . .
>
> "It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

In Harlan v. McGourin, 218 U. S. 448, this case was cited with approval.

In Post v. U. S., 161 U. S. 583, where an act provided that "all criminal proceedings instituted for the trial of the offences against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offences were committed," it was held that the court had no jurisdiction of an indictment thereafter presented by the grand jury for the district in one division, for an offence committed in another division before the passage of the act, and for which no complaint had been made against the defendant. In sustaining this ruling, Mr. Justice Gray, quoting from In re Bonner, 151 U. S. 242, 256, 257, said:

> "As said by this court in a recent case, 'in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits, in any essential requirements, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms.' 'It is plain that such court has jurisdiction to render a particular judgment, only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void.'"

Justice Gray added:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate." Virginia v. Paul, 148 U. S. 107, 119, 121; Rex v. Phillips, Russ. & Ry. 369; Regina v. Parker, Leigh & Cave, 459; s. c. 9 Cox Crim. Cas. 475.

In State v. Leese, 37 Neb. 92, s. c. 20 L. R. A. 579, Ex parte Bain, with other similar decisions, was cited in a case which involved the validity of an impeachment proceeding. Under the Constitution of Nebraska, "the Senate and House of Representatives, in joint convention, shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention for the purpose of acting upon such resolution, within three days of such notification." The trial of the impeachment takes place before the Supreme Court. Pursuant to the constitutional provision, the Legislature of Nebraska presented to the court articles of impeachment against Leese, who had been attorney general, charging him with misdemeanors in office during his incumbency of it. After answer had been interposed to the articles of impeachment exhibited, the managers appointed by the Legislature to prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in the articles of impeachment. In sustaining its decision Mr. Justice Norval, speaking for the court and referring to the terms of the Constitution which have been above quoted, said:

> "The authority thus given carries with it the power of the Senate and House of Representatives, under like restrictions, to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the Legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter or amend one which has been duly passed; and in neither case does the right exist. Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to permit the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court no amendment of the instrument,

in matter of substance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indictment. People v. Campbell, 4 Park. Crim. Rep. 386; Gregory v. State, 46 Ala. 151; Johnson v. State, Id. 212; McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; State v. McCarty, 2 Pinney, 513, 54 Am. Dec. 150; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849.

"We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeachment exhibited against the respondent. If they could do that, it necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the Legislature, might have rejected had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the Constitution."

It is thus clear that, in order to give this Court jurisdiction, the articles of impeachment must have been adopted by the Assembly, on the vote of a majority of the members elected thereto, when lawfully convened; otherwise there would be an entire absence of jurisdiction, and this Court might as well be called upon to act on charges presented by a private citizen, by the managers of a political party, or by the anonymous enemies of the person sought to be impeached. Jurisdiction depends on the action of a constitutional body, duly called together and empowered to act and acting in strict conformity with the mandate of the Constitution.

Continuing a study into the practical identity of an impeachment with an indictment, which is universally recognized, we will be aided in the present case by referring to the numerous decisions by which indictments have been declared invalid because of the improper constitution of the Court, in connection with which the grand jury finding the indictment sat, or the irregular manner in which such grand jury was convened.

Thus it is well established that an indictment found by a grand jury at a term of court held at a time unauthorized by law or at a term at which no grand jury is authorized, is a nullity as are all proceedings based thereon. State v. Brown, 127 N. C. 562; s. c., 37 Southeastern Rep. 330; Davis v. State, 46 Ala. 80.

In the absence of a statute permitting it, an indictment found or presented in vacation time by a grand jury convened in vacation time is void. Miller v. State, 69 Ind. 284; State v. Corbett, 42 Tex. 88, 90.

In order that an indictment or presentment may be valid the grand jury must have jurisdiction. Therefore, to render such indictment or presentment valid, the court in which the grand jury is acting must have jurisdiction. Shepard v. State, 64 Ind. 43; Rex v. Jones, 6 C. & P. 137.

This is well illustrated by the decision in People v. Knatt, 156 N. Y. 302. The defendant was indicted for maliciously destroying property. The act was a misdemeanor and not a felony. The indictment was found by a grand jury without the certificate provided for by section 57 of the Code of Criminal Procedure, by a county judge or justice of the Supreme Court, to the effect that it was reasonable that such charge should be prosecuted by indictment. It was held that in the absence of such certificate jurisdiction of the grand jury did not attach and the court in which the indictment was found could only proceed by indictment in a case of that character on condition that the statutory certificate had been first filed. See also Post v. U. S., 161 U. S. 583, *supra*.

It follows from these authorities that it is equally necessary to the validity of an indictment that the court in which it is found shall be legally organized and constituted, otherwise there is no jurisdiction.

In the case of Northrup v. People, 37 N. Y. 203, the Court of Appeals went further and decided that where the justices of the Supreme Court of a judicial district in the performance of their duty to appoint the times and places of holding courts within their district designated that the trial term should be held at White Plains in and for the county of Westchester, and the court after convening at White Plains adjourned the further proceedings to the court house at Bedford in that county, the trial of an indict-

ment for murder which proceeded at Bedford was void for want of jurisdiction. Judge Fullerton, writing for the court, said:

> "The power to fix the times and places of holding courts was committed by statute to all the judges and not to a single judge of a judicial district. In virtue of this power, White Plains was the only place appointed for holding the courts of oyer and terminer, for the year 1867, in the county of Westchester. It was not in the power of a single judge, at any time, and certainly not after all the judges had united in making the appointments, to appoint any other place for holding courts in that county. . . . The policy of the law is to inspire confidence in the administration of justice. It is the right of every citizen to know the times and places for holding the courts, where his liberty or property may be put in jeopardy, and that would be a lax system of legislation, indeed, which would leave them the subjects of sudden and perhaps capricious changes. Our Legislature has not so left them; they have solemnly determined, that all the judges of each district shall unite in designating the places of holding courts, and require that the appointments thus made shall be published in the state paper, for three weeks, before any court shall be held in pursuance of them. To sanction the court at which the prisoner was convicted, is to annul entirely all these provisions.
>
> "I have not failed to consider the argument, that Bedford was one of the places which might have been designated for holding the court in Westchester county. But the answer to this proposition is, that it was not designated and published as the statute required, and for that reason was not a place for holding court."

This case was cited with approval in People v. Sullivan, 115 N. Y. 191.

In People v. Nugent, 57 App. Div. 542, it was also followed. There a term of the county court of Erie county convened pursuant to an order which was not published as required by section 356 of the Code of Civil Procedure "once in each week for three successive weeks before a term is held," or "of four successive

weeks previous to the time of holding the first term under such rder" as required by the Code of Civil Procedure. The term as fixed for such a time that the four weeks' publication required under the latter code could not be made. It was held that the court was improperly convened and that an indictment found at such term was a nullity. Mr. Justice Williams said (p. 548):

> "These provisions should be complied with, and one of the essential prerequisites to the holding of a legally constituted term is the publication of the order appointing the same as provided for by the statutes of the State. No question of notice was involved in the Youngs case. The Northrup case seems to be an authority directly upon the point we are considering and never to have been overruled or criticised even. In a case of this kind it would be an unsafe rule to hold that a county judge, who has the sole power and authority to appoint the time for holding county courts should be permitted to appoint and hold such courts at his own will, disregarding the statute, and making appointments for such times as to render a compliance with the statute as to publishing the order impossible. Such a rule would enable a county judge in times of public excitement, to call a term of his court into existence without any notice to persons charged with crime, and thus seriously interfere with their rights under the Constitution and the laws of the State. We think the court was in error in denying defendant's motion to dismiss the indictment in question, requiring him to plead thereto and to stand his trial thereon. . . .
>
> "The court not having been properly convened and held, the indictment was invalid, as were all the proceedings had by the court with reference thereto."

In O'Byrnes v. The State, 51 Ala. 25, a conviction founded on an indictment presented by a grand jury not summoned on a venire by the judge, was reversed. The judge had issued a venire but on the return he quashed it and then without a new venire ordered the sheriff to summon more jurors and under this order the jury was summoned.

Bickell, J., said (pp. 28, 29):

"We cannot doubt that a grand jury constituted in any other manner than prescribed by statute is, in the language of this court, in State v. Brooks, supra, 'without legal warrant.' A grand jury is not a mere assemblage of fifteen or eighteen persons in the jury box, congregated by an order of the court, or by their own volition or at the summons or at the behest of an unauthorized persons." . . .

"If the court could legally set aside the venire drawn and summoned by the officers having authority to draw and summon it, the power is unlimited. The jurors summoned under its order could be set aside in the exercise of the same power, and so from time to time, until a jury was organized to meet the caprice and prejudice of the judge."

In U. S. v. Reed, 27 Fed. Cases No. 16134 (N. Y.), a motion was made to quash an indictment on various grounds, among which were irregularity in the marshal drawing jury, the fact that no order was made by district judge for a venire to summon the grand jury, and that one of the jurors was a volunteer and had never been summoned. Mr. Justice Nelson, then a member of the United States Supreme Court, and who had previously been Chief Justice of the Supreme Court of New York, said (pp. 729, 731):

"By the law of New York certain preliminary notices are necessary in getting together a grand jury. Can these notices be entirely dispensed with, and a mere voluntary body come together as a grand jury, and yet no objection be afterwards made by a party indicted by such a body? Suppose the case of a grand jury not drawn at all but admitted to have been packed. Can a man indicted by it be cut off by the provisions of the Revised Statutes from raising the objection?" . . .

"It being thus (at common law) a ground of challenge to the array in a given case, that the jury have been selected, summoned and returned by a person unfit to summon an indifferent jury to sit and judge in the case and it being the presumption that such a person would summon a jury not indifferent, but prejudiced, as respects the case to be heard,

the challenge to the array, so authorized, necessarily though perhaps more remotely touches and reaches the proper qualifications of the panel to sit and act in a particular case."

This brings us to a consideration of the provisions of the Constitution which relate to the jurisdiction of the Assembly to act as an informing and accusing body, and thus to set this tribunal in motion.

Article 6, section 13, of the Constitution, declares:

> "The Assembly shall have the power of impeachment, by a vote of the majority of all the members elected."

Article 3, section 1, provides for the creation of a Senate and Assembly. Section 2 provides that the Senate shall consist of fifty members, except as thereafter provided, and that the Assembly shall consist of one hundred and fifty members. Section 5 provides that the members of the Assembly shall be chosen by single districts, and gives directions as to their apportionment among the several counties of the State. Section 10 permits a majority of "each house" to constitute a quorum to do business. Section 11 requires "each house" to keep a journal of its proceedings, and the doors of "each house" to be kept open, except when the public welfare shall require secrecy, and then declares that "neither house" shall, without the consent of the other, adjourn for more than two days. Section 12 absolves the members from being questioned in any other place "for any speech or debate in either house of the Legislature."

Article 10, section 6, reads:

> "The political year and legislative term shall begin on the first day of January; and the Legislature shall, every year, assemble on the first Wednesday in January."

Finally, article 4, section 4, which deals with the duties and powers of the Governor, among other things provides:

> "He shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. At extraordinary sessions, no subject shall be acted upon, except such as the

Governor may recommend for consideration. He shall communicate by message to the Legislature at every session the condition of the State, and recommend such matters to it as he shall judge expedient."

It is our contention that the Assembly has no power of impeachment, except when duly convened at a regular session of the Legislature, or, if when convened at an extraordinary session of the Legislature, the Governor shall have recommended for consideration the impeachment of the person sought to be proceeded against.

The impeachment managers contend that the Assembly, whenever and however convened, has the power of impeachment, at any time. In fact it has been argued on their behalf, that, even though not convened, a majority of all of the members elected to the Assembly possess the power of impeachment.

The opinion of the Attorney General, rendered on August 18, 1913, asserts that the Assembly can adopt articles of impeachment by convening a majority of its members anywhere and at any time. He says:

"I understand it to be claimed that the Assembly was without jurisdiction to make and present the articles of impeachment in question, because at the time of the adoption thereof the Legislature was not in regular session but was in extraordinary session and the subject of impeachment was not a matter submitted to the Legislature for consideration by the Governor.

"After an examination of this question I have come to the conclusion that it is clearly based upon a misapprehension of the nature of the functions of the Assembly when adopting and presenting the articles. This is in no sense a legislative function: it is judicial."

Further on he continues:

"The power of the Assembly to present articles of impeachment is in no manner connected with its powers as one of the bodies of the Legislature. . . . Its powers are defined in article 6 of the Constitution which treats of the judiciary."

And again he says:

> "The question as to how the Assembly came in session is not pertinent to the inquiry, and the method by which such convention of the Assembly was had does not affect its jurisdictional power to act. . . .
>
> "In impeachment proceedings the Assembly acts judicially pursuant to power conferred upon it by the Constitution. This power not being limited in extent nor restricted as to procedure may be exercised at any time the Assembly may determine upon."

Mr. Justice Hasbrouck, in his recent opinion at Special Term in People ex rel. Robin v. The Warden, etc., practically adopted these views.

Assuming, for the purpose of argument, that the function of the Assembly in preferring articles of impeachment is judicial in its nature, although we shall later argue to the contrary, we urge that the conclusion of the Attorney General is unsound and his reasoning fallacious.

We have shown that every reference in the Constitution to "the Assembly" is a definite and specific reference to it as one of the "Houses" of the Legislature. The Constitution does not recognize any entity under the name of "the Assembly," except that body which exists as a constituent branch of the Legislature. There is but one Assembly. It is "*the* Assembly." It is not one organism in respect to article 3, and another when referred to in article 6 of the Constitution.

The mere fact that article 6 conferred upon the Assembly the power of impeachment, which the Attorney General is pleased to call judicial, does not operate as a metamorphosis of the nature of that body. It is still "the Assembly" and nothing more. It remains a constituent branch of the Legislature. It is not transformed into anything other or different than an integral part of the Legislature; a branch of it; one of its houses; endowed, if you please, with the quasi-judicial power of impeachment, but still acting merely within the orbit which the Constitution has assigned to it, as a part of the Legislature, and governed by the limitations imposed upon the Legislature.

The Attorney General assumes that because "the Assembly" has had conferred upon it this special function, it thereby necessarily and *ipso facto* loses its character and nature as a branch of the Legislature, and is no longer the body referred to in all parts of the Constitution as "*the Assembly*," but a different body, superior to the Constitution, without limitation as to its method of procedure, as to the time or place of its meeting, a law unto itself — not a fixed star, but a comet pursuing a course eccentric and erratic, subject to no restraint save that which it may itself place upon the whim and caprice of the majority of its members.

Nowhere in the State Constitution is the body which we know as "the Assembly" referred to by any other characterization than as "the Assembly." Everywhere it is *the* Assembly that is spoken of, and our opponents must certainly admit that in every case where it is mentioned, except in article 6, section 13, it is subject to the provisions of the Constitution, in regard to the time and place and conditions under which it shall convene.

But it is insisted that, when this same body is exercising its so-called judicial functions conferred by article 6 of the State Constitution, it is superior to, and can act with absolute freedom untrammeled by any of the provisions of the State Constitution relating to the Legislature or to "the Assembly," and this extraordinary claim of superiority of the Assembly is inferred, in spite of the limitation contained in the Constitution, which expressly negatives the existence of omnipotent power.

Nowhere in article 6 of the Constitution, which confers such alleged judicial power, nor in any other article of the Constitution, is there to be found a word or a syllable permitting the inference that when the Assembly acts as an accusing body, it is absolved from obedience to the beneficent limitations and restraints of the Constitution, which specifically and in clear and unambiguous language refer to and affect "the Assembly."

The question thus presented is one of the most important that has ever arisen in the political and judicial history of this State. Upon the determination of it depend the orderly government of this great commonwealth, the sanctity of the Constitution, and the "continuance of regulated liberty." For it is self-evident that, if one branch of the Legislature can convene a majority of

its members at any time or place, with or without notice to the others, or if such majority, without convening (and this is the logical consequence of the primary position taken by the impeachment managers), should be empowered to prepare articles of impeachment against any officer of the State, revolution and anarchy will inevitably result. Our government would effectually be Mexicanized.

In order to simplify the discussion of this proposition, fraught as it is with tremendous consequences, not only in the present case, but in cases which may hereafter arise, if a vicious precedent be now established, it should first be considered as though it were one which involved the impeachment of a judge of the Court of Appeals, or of a justice of the Supreme Court, and the impeachment had been instituted at a time when the Legislature was not convened either at a regular or at an extraordinary session. For, if the contention of the impeachment managers is reduced to its logical results, it means that a self-convened fraction of the Assembly, or a majority of its members, even though not convened, may lawfully impeach any judicial or executive functionary of the State. At this stage of the argument, therefore, we may leave out of consideration altogether the fact that, when the impeachment now sought to be tried was voted, the Legislature was convened in extraordinary session, and the Governor had not recommended, as a subject for action, the matter of impeachment.

Let us then suppose that the Legislature is not in session, and that it is sought to impeach a judge of one of our superior courts. There are one hundred and fifty members of the Assembly, scattered throughout the State, each county having at least one member. Each of them is engaged in his ordinary vocation. The business of some of them is apt to take them out of the State. It occurs to some individual, who may not even occupy an official capacity but who is possessed of powerful influence over a considerable number of the members of the Assembly, that he desires to have one or more of the judges impeached. There is no way known to the Constitution or to the law, by which the Assembly can be convened, except automatically on the first Wednesday in January, at the regular session, or by the proclamation of the Governor to meet in extraordinary session. But the regular

session may have adjourned sine die, and the Governor may have refused to call an extraordinary session, or may not even have been requested to call such session.

How can the Assembly be convened under such circumstances? At whose instance? Certainly not at that of the private individual, who is interested in bringing about the impeachment of a judge. Certainly not by any member of the Assembly who should desire to assume authority to convene that body and to usurp the functions vested exclusively in the Executive. It is inconceivable that the one hundred and fifty members of the Assembly should spontaneously assemble, at one and the same place, and at one and the same time. Who is to summon the assemblymen? Upon whose mandate are they to be called together? What is the penalty of the refusal of any of them to meet his fellows? Can the sergeant-at-arms who had served at the adjourned session forcibly bring them to the place of meeting? By whose sanction would he exercise control over the persons of the unwilling members? Where is the source of power which enables him, for such a purpose, and under such circumstances, to hale to a place of meeting and put under arrest the recalcitrant assemblymen? What would be his defense to an action for false imprisonment, or assault and battery? Kilbourn v. Thompson, 103 U. S. 168.

Assuming that, by concert of action, by the exercise of potent personal or political influence, a bare majority of the elected members of the Assembly should be brought together, what is there to prevent them, under such circumstances, from meeting in secrecy, at a private house, in a hotel, at a political club, in an atmosphere supercharged with prejudice, hatred and malice, without giving notice to the other members of the Assembly, and to concoct under the knout of an absolute despot and under cover of darkness, articles of impeachment against a judicial officer who because not subservient has gained the enmity of him who initiated so extraordinary a convocation?

Who, under such circumstances, would be charged with the duty of giving notice to all the members of the Assembly? What would be the nature of the notice to be given? What length of time would intervene between the announcement of the purpose of convening the Assembly, and its actual coming together?

Would one day's notice be sufficient? Would it be by public proclamation? If so, who would make the proclamation?

It is easy to perceive that such a situation is replete with the potentiality of fraud, connivance and collusion. Those in the secret of the projectors of such a movement might easily manipulate the proceedings so as to eliminate such members who might be reasonably expected to oppose impeachment, and who might be able by their arguments and presentation of facts to convince a majority that impeachment would be improper and injurious to the best interests of the State. If such procedure should now be declared to be within the spirit of the Constitution, the time may come when, as a result of momentary excitement, the rhetoric of a demagogue, or headlong passion, a bare majority of the Assembly may be brought together by malign influences, for the very purpose of impeaching every member of the Court of Appeals and every justice of the Supreme Court.

Under article 6, section 13, of the Constitution, "no judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the Senate, until he shall have been acquitted." Under such circumstances, chaos and anarchy would reign, and grim revolution would stalk throughout the State. This is not a mere figment of the imagination. There have been frequent occasions when decisions by the highest courts of the land have been stigmatized by demagogues or by those impatient of restraint as calling for the impeachment of the judges who pronounced them; when adjudications which have given effect to constitutional limitations designed for the protection of life, liberty and property, have been attacked as reactionary and as the medium of accomplishing injustice; when inflammatory orators have, from the forum and the hustings, denounced judges who fearlessly dared to do right, and, against their own sympathies, observed their oaths to support the Constitution, which they were called upon to interpret.

If the contentions of the impeachment managers in the present case were upheld, would it not, at such periods of storm and stress as are apt to arise in every decade of our history, seal the fountains of justice and paralyze the arm of the judiciary? And this would be the more likely to occur if such an attack upon the

judiciary were endorsed by influential or popular newspapers, or by individuals capable of fanning into flame the smouldering embers of animosity and of whetting the voracious appetite of class interest.

But, let us proceed and assume that the Assembly or a fragment of its membership shall have thus convened itself, how shall it, in the case supposed, "prefer to the Senate" the articles of impeachment as contemplated by the language of section 13 of article 6, which clearly ordains that they must be so preferred? How is the Senate to be convened? Under what constitutional sanction? Upon whose mandate? At what time and where? What, until it so convenes, is to become of the impeachment, and what of the official against whom it is directed?

It is thus apparent that this situation bristles with insuperable difficulties, that perils lurk at every turn, and that the permanency of our Government is threatened if the Assembly or its members were thus permitted to convene or to act without convening.

Most careful research has failed to discover instances, in the history of Congress, and of the Legislatures of the several states of the Union, when a legislative body, or one of its component parts, has ever undertaken to initiate proceedings to convene itself, or to meet otherwise than at a regular or extraordinary session, called in conformity with the terms of the organic law. The absence of precedent is a most eloquent argument against the existence of such power. It is recognized as contrary to the spirit of our republican institutions, for one of the coordinate departments of the Government to usurp authority, and to undertake the exercise of a function which is impliedly denied it by the fundamental law.

Our Houses of Representatives and Assemblies are modeled upon the House of Commons; our Senates upon the House of Lords. Even in England, where Parliament is said to be omnipotent, where there is no written Constitution to limit and circumscribe and define its power, that potent body is incapable of convening itself for any purpose. It can only assemble pursuant to a royal mandate, and it has been only in times of revolution when it ventured to act without such mandate. But, mark you, whenever it so acted, it was deemed necessary, by means of

curative legislation, to confirm the acts of a Parliament thus irregularly assembled.

With his customary clarity, Blackstone deals with this subject (1 Black. Com. ch. 2, 150), saying:

> "1. As to the manner and time of assembling. The Parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no Parliament can be convened by its own authority, or by the authority of any except the king alone. And this prerogative is founded upon very good reasons. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met and half absented themselves, who shall determine which is really the legislative body, the part assembled or that which stays away? It is therefore necessary that the Parliament should be called together at a determined time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and, of the three constituent parts, this office can only appertain to the king; as he is a single person whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the Legislature that has a separate existence, and is capable of performing any act at a time when no Parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no Parliament in being, the last Parliament revives, and it is to sit again for six months, unless dissolved by the successor; for this revived Parliament must have been originally summoned by the crown.
>
> "It is true, that by a statute, 16 Car. I. c. I., it was enacted that, if the king neglected to call a Parliament for three years, the peers might assemble and issue out writs for

choosing one: and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated; and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. I. From thence therefore no precedent can be drawn.

"It is also true, that the convention-parliament, which restored King Charles the Second, met above a month before his return; the lords of their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of Parliament; and that the said Parliament sat till the twenty-ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good Parliament, notwithstanding the defect of the king's writ. So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers whether even this healing act made it a good Parliament; and held by very many in the negative; though it seems to have been too nice a scruple. And yet out of abundant caution, it was thought necessary to confirm its acts in the next Parliament, by statute 13 Car. II. c. 7 & c. 14.

"It is likewise true, that at the time of the revolution, A. D. 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange, afterwards King William, met in a convention and therein disposed of the Crown and Kingdom. But it must be remembered this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that King James

the Second had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei,* that the form of the royal writs must be laid aside, otherwise no Parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would undisputably vacate the throne; in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention of 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M. st. 1, c. 1, that this convention was really the two houses of Parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, and each of which, by the way, induced a revolution in the government, the rule laid down is in general certain, that the king, only, can convoke a Parliament.

"And this by the ancient statutes of the realm he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a new Parliament every year but only to permit a Parliament to sit annually for the redress of grievances, and dispatch of business if need be. These last words are so loose and vague, that such of our monarchs as were inclined to govern without Parlia-

ments, neglected the convoking them sometimes for a very considerable period, under the pretence that there was no need for them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted that the sitting and holding of Parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2 c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, Parliaments, ought to be held frequently. And this indefinite frequency is again reduced to a certainty by statute 6 W. & M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new Parliament shall be called within three years after the determination of the former."

In 1 Anson's Law and Custom of the Constitution (edition of 1911), the author says, at page 53:

"The existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same royal proclamation issued by the king on the advice of the privy council under the great seal. The proclamation discharges the existing Parliament from its duties of attendance, declares the desire of the crown to have the advice of its people, and the royal will and pleasure to call a new Parliament. It further announces an order addressed by the crown in council to the chancellors of Great Britain and Ireland to issue the necessary writs, and states that this proclamation is to be their authority for so doing.

"Until recent times it was the practice for a warrant under the sign manual to be given by the crown to the chancellor to issue the necessary writs. This has ceased to be done; an order in Council is made directing that writs shall be issued, but, as matter of fact, the royal proclamation is treated by the crown office in chancery as the authority for the issue. . . . The writs were returnable according to the provisions of Magna Charta, within forty

days of their issue; this period was extended after the union with Scotland to fifty days, and has been reduced by an act (15 Viet. c. 23) to thirty-five days."

At page 70 he continues:

"A dissolution brings the existence of Parliament to an end; a prorogation brings the session of Parliament to an end; an adjournment brings about a cessation of the business of one or other house for a period of hours, days or weeks. The adjournment of either house takes place at its own discretion, unaffected by the proceedings of the other house. The crown cannot make either house adjourn; it has sometimes signified its pleasure that the houses adjourn, but there is no reason why its pleasure should also be the pleasure of the houses. The crown has, however, a statutory power to call upon Parliament to meet before the conclusion of an adjournment contemplated, where both houses stand adjourned for more than fourteen days. The power is exercised by proclamation declaring that the houses shall meet on a day not less than six days from the date of the proclamation.

"Prorogation takes place by the exercise of the royal prerogative; it ends the session of both houses simultaneously; and terminates all pending business. A prorogation is to a specified date, but it may be necessary either to postpone or to accelerate the meeting of Parliament.

". . . The power to accelerate a meeting of Parliament which has been prorogued is governed by statute. An act of 1797 empowered the king to advance the meeting from a date to which prorogation had taken place to a date not earlier than fourteen days from the date of the proclamation and this period was reduced to six days by an act of 1870."

At page 302 he asserts:

"It would seem then that, apart from the general expression of the act of Edward III, the only statutory se-

curities which we have ever possessed for the frequent summons and sittings of Parliament are the act of Charles II, providing that Parliament shall sit at least once in every three years, and the act of William and Mary to the effect that we shall not be more than three years without a Parliament. Nor do the statutes say what is to happen if the crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the crown might not fulfil the law."

In 21 Halsbury's Law of England, title "Parliament," page 687, it is stated:

"A new Parliament can be called together for the transaction of business only by the crown."

In volume 6 of the same work, title "Constitutional Law," page 389, we find this pronouncement:

"A new Parliament cannot legally assemble without the royal writ, and though on certain occasions, through necessity occasioned by the king's absence or abdication, the two houses have met and transacted business in an irregular manner without the royal writ, such meetings are termed Convention Parliaments, to distinguish them from Parliaments proper, and their proceedings are not recognized unless subsequently ratified by statute."

In a note it is added:

"This is significant in that it shows that Parliament acting on its own initiative and convening itself for the purpose of transacting business is *ultra vires* and irregular and to have any force and effect legally it is necessary that there be a subsequent ratification by that body constitutionally convened."

Cushing's Law and Practice of Legislative Assemblies (1913 edition), section 216, is to the same effect.

In providing in the Federal and State Constitutions for the meetings of the Congress and the Legislature, the English model was departed from only so far as to provide a fixed date for the annual meeting of those bodies. Where the date of meeting is fixed, no summons is needed. But they cannot be convened in extraordinary session without the summons of the President in the one case, and the Governor in the other. There must be either a fixed date or a summons by authority. In New York the Legislature may act in extraordinary session only on subjects recommended to it by the Governor, so that our opponents have been obliged to concede that if the Assembly could rightfully impeach at an extraordinary session, it could impeach of its own motion without being called by any sort of summons.

We have said that there is no precedent in any of our states where a Legislature attempted to convene itself. This is perhaps slightly but not entirely inaccurate, because, in People v. Hatch, 33 Ill. 9, the Supreme Court of that state had occasion to pass upon an attempt of the Legislature to convene itself after it had been adjourned to a certain day, before that day came. The Constitution of Illinois provided that, in case of disagreement between the two houses with respect to the time of adjournment, the Governor shall have power to adjourn the General Assembly by his proclamation. Acting under this authority, the Governor assumed to adjourn the General Assembly to a specified date. Both houses adopted a protest against his action as illegal, and a large number of the members returned to their homes. No adjourning order of either house appeared on the journals, and for a period of ten days no entries were made in the journals. At the expiration of that time, but before the date for reconvening fixed by the Governor, an attempt was made to reconvene the Legislature. It was held that the power did not exist, Mr. Justice Breese saying (p. 163):

> "The session having thus terminated, it is needless to inquire if it could be resumed at a future day, without a previous vote of the two houses, or by the proclamation of the Governor. Should a legislative body be dispersed by any sudden irruption, or insurrection, or by any external force, their power might, perhaps, remain, and the duty

also, to reassemble without any previous vote for such purpose. When such dispersion is the result of its own action, I know of no mode by which it can be brought together again, as a legislative assembly, in the absence of such previous vote, without a call from the executive.

"Blackstone says, if, at the time of an actual rebellion, or imminent danger of invasion, the Parliament shall be separated by adjournment or prorogative, the king is empowered to call them together by proclamation, with fourteen days' notice of the time appointed for their assembling (1 Black. Com. 145, ch. 2). The spontaneous meeting of all the members, except in the case stated, at a time not appointed by law, and without a previous vote for such purpose, would avail nothing. The executive, if he desired, could not recognize it as a legislative body, nor could it perform a legislative act, having any binding authority. This being so, it follows a less number than a quorum cannot meet and hold a legislative session, no matter under what convictions they may assemble, or what rights they may suppose they can preserve by such meeting. It would be a proceeding not sanctioned by our Constitution or laws."

So, in French v. State Senate, 146 Cal. 604; s. c., 80 Pac. Rep. 1031, 69 L. R. A. 556, the Senate of California expelled the petitioners for malfeasance in office, consisting of the taking of a bribe to influence their conduct as senators. It was claimed that the Senate did not give them a hearing or afford them a trial upon charges made nor permit them to make any defence thereto, and that the charges of bribery were false. A writ of mandamus was prayed for to compel the Senate to restore them to membership therein. The application was denied, and in the course of his opinion Mr. Justice Shaw said:

"An attempt by this court to direct or control the Legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions which it is expressly forbidden to do.

"Even if the court should attempt to usurp this legislative function, there is no means whereby it could carry its

judgment into effect and give the relief demanded. The thirty-sixth session of the Legislature has adjourned *sine die;* it is a thing past, and cannot be reconvened upon the mandate of the judicial power (Const., art. 3). The Senate could not reinstate the petitioners as members of that session except when lawfully in session. Nor can the body which composed the thirty-sixth session be again called together except in special session and at the behest of the Governor."

The great case of Luther v. Borden, 7 How. (U. S.) 1, indicates the possibilities which might result from a decision permitting the Legislature, or either of its component parts, to convene itself. The state of Rhode Island, until May, 1843, did not possess a Constitution such as had been adopted by the other states. It conducted its government under the charter granted by Charles II to the Colony of Rhode Island and Providence Plantations. In 1841 a portion of the people held meetings and formed associations, which resulted in the election of delegates to a convention to form a new Constitution, to be submitted to the people for their adoption or rejection. The convention framed such a Constitution, directed a vote to be taken upon it, and declared afterwards that it had been adopted and ratified by a majority of the people of the state. The Charter Government did not, however, acquiesce in these proceedings, but in May, 1843, another Constitution, framed by a convention called together by the Charter Government, went into operation. In consequence of these proceedings, the state, for a time, was placed under martial law. The Constitution of 1843 was eventually recognized as controlling. Although there were serious evils which were sought to be obviated by those who brought about the adoption of the Constitution of 1841, they sought to make a virtue of what they believed to be a necessity, by convoking the constitutional convention on their own initiative. The inevitable consequence of such action was a miniature civil war, which would be most likely to be precipitated in any state of the Union, if a Legislature, or a branch of it, should undertake to convene itself under conditions such as would be likely to

occur, if it should be now determined that such power may be exercised at any time, anywhere, and in any way, that the members of the Legislature or either of its branches or a part of them, may choose.

The soundness of our contention finds remarkable corroboration in the Constitution of Alabama adopted in 1901, where it was found necessary to make provision for the very situation which is presented in this case.

This was done in article 7, section 173, where after providing for the impeachment of various state officers before "the Senate sitting as a Court of Impeachment, under oath or affirmation, on articles or charges preferred by the House of Representatives," the Constitution proceeds:

> "If at any time when the Legislature is not in session, a majority of all the members elected to the House of Representatives shall certify in writing to the Secretary of State their desire to meet to consider the impeachment of the Governor, Lieutenant Governor, or other officer administering the office of Governor, it shall be the duty of the Secretary of State immediately to notify the speaker of the House, who shall, within ten days after receipt of such notice summon the members of the House by publication in some newspaper published at the capital, to assemble at the capitol at a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the Secretary of State, to consider the impeachment of the Governor, Lieutenant Governor or other officer administering the office of Governor. If the House of Representatives prefer articles of impeachment, the speaker of the House shall forthwith notify the Lieutenant Governor, unless he be the officer impeached, in which event he shall notify the Secretary of State, who shall summon, in the manner herein above provided for, the members of the Senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the House, for the purpose of organizing as a court of impeachment. The Senate when thus organized, shall hear and try such articles of impeachment against the Governor,

Lieutenant Governor or other officer administering the office of Governor as may be preferred by the House of Representatives."

Appendix A, which I shall submit with this argument, contains the Alabama provision with respect to extraordinary sessions of the Legislature. Here we find, therefore, full recognition of the proposition that neither the Legislature nor a branch thereof can convene itself, and that when it is sought to impeach a Governor, if he fails to call the Legislature together in extraordinary session to act on charges made against him, full constitutional machinery for such convocation by other methods must be provided; otherwise action must be deferred until the regular session of the Legislature.

In opposition to our contention, it has been urged by the impeachment managers that it is a general rule that, where the Constitution gives a general power, or enjoins a duty, it also gives, by implication, every opportunity for the exercise of the one or the performance of the other. This is, however, only a partial statement of the rule.

As shown in the leading case of Field v. People, 3 Ill. 79, it is modified by the further rule, that where the means for the exercise of a granted power are also given, no other or different means or powers can be implied, either on account of convenience or because they may be more effectual. The settled doctrine is, that implication for the purpose of conferring power should be resorted to with great caution, and only for the most pursuasive reasons.

The present case is one which admirably illustrates the wisdom of this qualification of the rule invoked by those who claim that the Assembly has the right of convening itself. Not only would such an interpretation confer an extraordinary and unusual power, one which has never been heretofore exercised, either in England or in the United States, but it would entirely ignore the power which is now lodged under the Constitution in the Governor to convene the Legislature in extraordinary session, as supplementing the explicit provision of the Constitution whereby both houses of the Legislature are convened automatically on the

first Wednesday in January of each year. There is, therefore, no occasion for indulging in any implication in order to supply the means for convening the Assembly. They are fully provided for by the express terms of the Constitution, and where express power is granted, there is no occasion or justification for the implication of other or different power.

If the Assembly cannot convene itself and act when so convened, it scarcely requires argument to sustain the proposition that it cannot act without being convened, by independent and separate individual action.

It will suffice to consider the analogy presented by the authorities dealing with the acts of the directors of a modern corporation. For if they cannot act, unless regularly convened, *a fortiori*, the Legislature of the State, and its several branches, cannot so act.

When the Constitution refers to the functions performed by the Assembly in impeachment proceedings, it refers to action by the Assembly, as an entity, not to the assemblymen who compose it. The Assembly, that is, the constitutional organism known as such, has the power to impeach by the vote of a majority of all the members elected. The action taken is not that of the members but of the body which all of them taken together constitute. It is inconceivable that the members of that body acting separately and singly, and not as an assembled whole, can ever be considered as "the Assembly."

Directors or trustees of a corporation cannot vote and act as a board without coming together. Their assent to a proposition separately and singly is void. They are chosen to meet and confer and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner. Brinkerhoff Co. v. Boyd, 192 Mo. 597; Demarest v. Spiral, etc., Co., 71 N. J. L. 14; Audenreid v. East, etc., Co., 68 N. J. Eq. 450; Tradesman Pub. Co. v. Knoxville Car Wheel Co., 91 Tenn. 634; Re Haycraft, etc., Co. (1900) 2 Ch. 230; Pierce v. Morse-Oliver Co., 94 Me. 406; Buttrick v. Nashua R. R. Co., 62 N. H. 413; Columbia Bank v. Gospel Tabernacle, 127 N. Y. 361.

The separate assent of the board of trustees of a religious corporation to the performance of a corporate act is void. The

members must meet and confer before their action can have any validity. Peoples Bank v. St. Anthony's Church, 109 N. Y. 512.

A separate assent of a township committee to the construction of a street railway is illegal. West Jersey Traction Co. v. Camden Co., 53 N. J. Eq. 163.

Where a tax is assessed by two trustees in meeting assembled, who subsequently obtain the separate and private assent of the third trustee, the action taken is void. Keeler v. Frost, 22 Barb. 400; Schuman v. Seymour, 24 N. J. Eq. 143.

The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. Taymouth v. Koehler, 35 Mich. 22.

A majority of a school board cannot act separately and singly, no meeting being held. Herrington v. District, 47 Iowa 11.

In Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 208, the learned Vice Chancellor said, in a case which depended upon the validity of the action of the board of trustees of a church, where it appeared that a majority of the trustees, while acting as a council, had approved of the adoption of certain resolutions which indicated their intention with regard to the matter which was to be acted upon by the board of trustees:

> "The conference or council was a board clothed with the spiritual regulation and government of the church. It had nothing to do with the control or direction of its temporalities. The statutes vested those duties in the trustees. The fact that a majority of the trustees were present, acting as a council, does not make the resolutions of the council the act of the board of trustees. Suppose in the case of a bank, that at a general meeting of the stockholders certain resolutions should be adopted to sell land, or do any other corporate act, and it should be made to appear that all the directors of the bank were present assenting to what was done; the corporation would not be bound unless the directors at a meeting of the board, should concur in the resolutions.
>
> "The directors in the bank, and the trustees in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them,

they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class in which they are but a component part, be a valid corporate act. In thus acting they are distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear on the trustees, which, in their proper board, would be unheeded; and no one can say with certainty, that their vote in the latter event would have been the same.

"It was held in the Case of the Corporations, 4 Coke's Rep. 77, *b*, that where the power to make a by-law was in the mayor and aldermen, a by-law made by the mayor, aldermen and commonalty was void. And see Ex parte Rogers, and note *a*, 7 Cowen 526, 530; The King v. Miller, 6 Term Rep. 268; Willcock on Municipal Corporations, 101, 102; Brown v. Porter, 10 Mass. 99, per Sewall, J."

This principle has been extended to the action of political bodies.

Thus, in People ex rel. Henry v. Nostrand, 46 N. Y. 375, 383, the validity of the action of two members of a board of highway commissioners, which was by statute composed of three members, during the existence of a vacancy in the board was under consideration. Chief Judge Church said:

"The statute appointing them confers the power upon three and provides that whenever the number of commissioners is reduced below three the vacancy shall be filled by the county judge. It is quite evident that the Legislature intended to intrust the powers conferred to three persons,

and that the judgment of that number should be requisite to the discharge of their duties. I am not aware of any principle, which enables two persons to discharge a public duty expressly devolved upon three without consultation with the third. At common law two could act in such a case, but it was indispensable that the three should meet and deliberate upon the subject. (Crocker v. Crane, 21 Wend. 211; 7 Cow. 526, note *a*; 22 Barb. 400.) . . . A majority may perform the duty after all have met and deliberated, but two cannot do this when the office of the third is vacant any more than they could if the third had not met or been consulted."

It is likewise an elementary proposition, that stockholders can hold elections and transact such other business as they as a body are qualified to transact, only at corporate meetings duly called and convened. Consequently, all action taken elsewhere than at such a meeting, and all separate consents by individual stockholders, are void. Commonwealth v. Cullen, 13 Pa. St. 133; Livingston v. Lynch, 4 Johns. Ch. 573, 597; Torrey v. Baker, 83 Mass. 120; De La Verne Co. v. German Sav. Institution, 175 U. S. 40.

In other words, a corporation and its stockholders are separate and independent entities, and the action of stockholders can only bind the corporation when they are duly convened at a meeting held for the purpose of performing a corporate act. Medina G. & E. L. Co. v. Buffalo L. T. & S. D. Co., 162 N. Y. 67; Saranac &c. R. R. Co. v. Arnold, 167 N. Y. 368; MacDonnell v. Buffalo L. T. & S. D. Co., 193 N. Y. 92; England v. Dearborn, 141 Mass. 590.

What is true in the case of a corporation as to the necessity of notice to its directors with respect to the holding of a special meeting and of the business to be transacted thereat, must be likewise true of a self-convened meeting of the Legislature or of one of its branches, especially when it is claimed that it is to act not in the exercise of its usual legislative functions, but judicially.

A special meeting at which less than all of the board of

directors of a corporation attend, no notice having been given to the other directors as to the time for holding the meeting and the business to be transacted by it, invalidates the action of those who attend. Every director has not only the duty, but the right, to attend, in order that he may present to his associates the views which he entertains and be enabled to pursuade them to adopt his views rather than those which they are inclined to act upon.

The very purpose of a deliberative body would be destroyed if only a portion of those who have a right to attend and to be heard and to vote, are enabled to avail themselves of those privileges, not so much for their own advantage, but for the benefit of those whom they represent.

Thus in Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78, it was said:

> "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings, that is, such as are provided for by charter or the by-laws fixing time and place, then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting."

A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. First National Bank v. Asheville Co., 116 N. C. 827.

A special meeting of directors is void if no notice is given to absent directors. The fact that a director who owns or controls a majority of the stock is present, does not validate such a meeting even though he favor the action taken. Hill v. Rich Hill Co., 119 Mo. 9.

To the same effect are Smith v. Dorn, 96 Cal. 73; Harding v.

Vandewater, 40 Cal. 77; Moore v. Hammond, 6 Barn. & Co. 456; Doyle v. Mizner, 42 Mich. 332.

Notice to all the trustees of a religious corporation is necessary. Thompson v. West, 59 Neb. 677.

These rules have been applied to the governing bodies of municipal corporations. Smyth v. Darley, 2 H. L. 789; Rex v. Carlisle, 1 Strange 385.

Bonds issued under authority of a meeting of two commissioners of a town, without notice to a third commissioner, are not valid. Pike County v. Rowland, 94 Pa. St. 238.

Having sufficiently considered the propositions affecting the power of the Assembly to convene itself, and having shown that such power does not exist, I come to the all-important point that the Assembly had no power to impeach at the extraordinary session, in the absence of action by the Governor enabling it to deal with that subject.

Under the Constitutions of 1821 and 1846 the Governor was empowered to convene the Legislature or the Senate only on extraordinary occasions. It was left absolutely to his discretion, as it is under the present Constitution, to determine as to whether he would convene either the Senate or both houses in extraordinary session. It was never suggested that, if he declined to do so, the Senate could convene itself or both houses could convene themselves.

Unquestionably there can be no extraordinary session of the Senate or of the Legislature unless the Governor calls it into being. His discretionary power in that regard is absolute. It cannot be controlled either by the individual legislators, by statute, by resolution, or by rule; nor can it be compelled by judicial action. However great the necessity for such a session; however imperative the public necessity, his *non volo,* is conclusive. The power conferred on the Governor is political power in the exercise of which, as was said in Marbury v. Madison, 1 Cranch 137, "he is accountable only to his country in his political character, and to his own conscience, and whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion."

In re Governor's Proclamation, 35 Pac. 530, Elliot, J., speaking for the Supreme Court of Colorado, said:

> "The Governor is thus invested with extraordinary powers. He alone is to determine whether there is an extraordinary occasion for convening the Legislature, and he alone is to designate the business which the Legislature is to transact when thus convened."

In Farrelly v. Cole, 56 Pac. 592 (s. c. 60 Kansas 356, 54 L. R. A. 464), Smith, J., said:

> "We will suppose again that the Constitution empowers the executive to convene the Legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the Constitutional sense. It is obvious that the question is addressed exclusively to the executive department and neither the Legislature nor the judicial department can interfere to compel action, if the executive decides against it or to enjoin action, if, in his opinion, the proper occasion has arisen."

See also Re Legislative Adjournments, 18 R. I. 824; s. c. 22 L. R. A. 716.

In Pillsbury's Petition, 217 Pa. 227 (1907); s. c. 66 Atl. Rep. 348; aff'd., 207 U. S. 161, the Governor had called the Legislature together in extra session by proclamation, and then issued a second proclamation, which right was questioned. Brown, J., at page 230, said:

> "Whether the General Assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The Constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread epidemics or general calamities of any kind, requiring instant convening of the Legislature, and, in the power given to the Governor to call it, no time for notice is too short, if it can reach the members of the General Assembly."

This leaves to the discretion of the Governor the calling together of the Legislature. There is not even the suggestion that in any of the serious exigencies enumerated (which are of much more import to the welfare of the people of the State than even the misconduct of a Governor) the Legislature can convene of its own volition for the purpose of dealing with them.

The power which was thus conferred on the Governor was intended to be the counterpart of that which was vested in the English sovereigns with respect to the convocation of Parliament. It was found in actual practice that when the Governor convened the Legislature in extraordinary session it was apt to prolong its deliberations, necessarily involving the State in large expense, and especially where the Governor and the Legislature represented different political parties, occasioning irritation and undue friction in the transaction of the public business.

It was for that reason that in the constitutional convention of 1867 it was deemed desirable that there should be a limitation placed upon the business which could be transacted at an extraordinary session, and various projects were presented and debated at some length bearing on this subject.

In volume 2 of Lincoln's Constitutional History of New York, page 330, the author summarized the debate on this proposition as follows:

> "The committee on legislative powers and duties reported a section relating to extraordinary sessions of the Legislature, and which provided, in substance, that the Governor should specify in his proclamation the subjects to be considered at such session, and the Legislature was prohibited from considering any others. The original report of the committee on the Governor and Lieutenant Governor did not contain this recommendation, but, in the progress of the consideration of the subject, the provision was included in a section in the executive article reported by the committee on revision. Mr. Church sought to amend the section so as to permit the Legislature to transact business not included in the Governor's proclamation. He thought the Governor should not have the power to limit the business to be transacted by the

Legislature at an extraordinary session. The convention declined to accept Mr. Church's amendment, but did adopt a suggestion by Judge Comstock, that laws enacted at a special session must relate to the subjects included in the proclamation. Judge Comstock said this was intended to confine legislation to subjects specified in the proclamation, but to permit the Legislature to exercise the power of appointment at a special session, either by electing officers, or acting on nominations by the Governor."

For the full text of this debate, I refer to volume 5 of the Proceedings of the Constitutional Convention of 1867, pages 3614 to 3619.

The proposed amendment as thus formulated, and as submitted at the election held in 1869, reads as follows (2 Lincoln, p. 439):

"Art. IV, sec. 6. Extraordinary sessions. The Governor may convene the Senate on extraordinary occasions, and may call special sessions of the Legislature by proclamation, in which shall be stated the particular object or objects for which they are called; and no law shall be enacted at any special session except such as shall relate to the objects stated in the proclamation."

The election of 1869 resulted in the rejection of all the projects of the convention of 1867, except the judiciary article. It was recognized, however, that the Constitution required further amendment and thereupon, in compliance with the recommendations of Governor Hoffman contained in his annual message of 1872, in which he advocated constitutional reform, a commission of thirty-two eminent citizens was selected to consider and report to the Legislature recommendations of changes in the Constitution. Of the commission so appointed, six had been members of the convention of 1867, and all of them were lawyers of high standing and great experience. Among them were George Opdyke, Augustus Schell, William Cassidy, David Rumsey, Erastus Brooks, Francis Kernan, John D. Van Buren, Benjamin D. Stillman, Samuel W. Jackson, Daniel Pratt, Lucius Robinson, George

B. Bradley, Horace V. Howland and Sherman S. Rogers (2 Lincoln, p. 470).

The commission, after protracted deliberation, presented a report to the Legislature proposing various amendments, which were finally submitted to the people at the election held in November, 1874, and adopted to go into effect on January 1, 1875. Among other amendments thus ushered into existence was the amendment to article 4, section 4, which added to the then existing Constitution, the following clause:

> "At extraordinary sessions no subject shall be acted upon, except such as the Governor may recommend for consideration."

Mr. Lincoln shows (vol. 2, pp. 512, 513) that this clause was proposed by Mr. Van Buren. The comment which he makes upon it is:

> "In the preceding chapter I have given the history of a similar provision in the convention of 1867, where, after much discussion, the limitation was confined to the enactment of laws relating to the objects stated in the proclamation, leaving the Legislature free to act on appointments and other incidental matters. The commission, in its report to the Legislature, said concerning this clause that 'in limiting the action of the Legislature at extraordinary sessions, the commissioners believed that on such occasions it was unwise to engage in general legislation, and, therefore, it is proposed to confine the Legislature to the subjects recommended by the Governor.'"

It is at once observed that the language adopted by the commission of 1872 is more comprehensive and far reaching than the language proposed by Judge Comstock at the convention of 1867. The latter merely restricted the Legislature when it convened in extraordinary session to the passage of such laws as were recommended by the Governor, but allowed the Legislature unlimited scope with respect to all other matters.

With full knowledge of such purpose and of the debates held in the convention of 1867, which were still ringing in their ears, the commissioners deliberately adopted phraseology which ex-

cluded all action by the Legislature, whether legislative or otherwise, except such as the Governor might recommend for consideration. "No subject shall be acted upon, except such as the Governor may recommend for consideration."

It was not that no law should be enacted, except, etc. It was not that there should be no legislation, except, etc.; nor that no bill should be passed except, etc.; nor that no subject should be acted upon the Legislature, except, etc.; nor was any other similarly limited form of expression used. Its prohibition related to all action upon any subject, except, etc. No subject shall be acted upon, except, etc. No words could be more general and all-embracing. Every possible subject on which a legislative body, or either of its component parts, may act is covered, and any possible action on any conceivable subject is prohibited unless the constitutional condition precedent is complied with. The prohibition against action was directed not only against the Legislature but against its integral parts, the Assembly as well as the Senate. Omne majus in se continet minus.

Nor is it possible to coin a phrase which excludes ambiguity more completely than does that which was so chosen. We have already proved that the choice of this language was not accidental; it was intentional and deliberate for the very purpose of obviating what had been recognized as an existing evil.

The men who chose this language were familiar with the history of the State and its jurisprudence. They were men of culture, who understood the meaning of words and who knew what it meant to frame the organic law.

The word "subject" has long been defined and understood to mean that which is brought under thought or examination; that which is taken up for discussion. (People v. Parvin (Cal.), 14 Pac. 783, 784, quoting Webster's Dictionary.)

The Century Dictionary gives as one of the definitions of the word "subject" the following:

> "II. 4. That on which mental operation is performed; that which is thought, spoken or treated of."

As an illustration, the following lines from Pope's translation of the Iliad are given:

> "But this, no more the subject of debate,
> Is past, forgotten, and resign'd to fate."

When, therefore, the Constitution was thus amended, so as to limit the Legislature and the Senate to action at extraordinary sessions on such subjects only as the Governor recommended, it meant, and could mean nothing else than, that the Legislature and both of its houses were powerless to take any action, except such as the Governor expressly recommended. These words did not relate merely to legislation, but to the power of making appointments, or of electing such public officers whom under the law the Legislature was empowered to choose. They necessarily also included the power to impeach, because certainly that was a "subject"— one which would presumptively call for thought, examination and discussion. Hence, impeachment came not only within the very terms of this constitutional provision, but also within the reasons which actuated those who had framed it to make it a part of our organic law.

Ordinarily, whenever there has been an impeachment the preliminaries, as well as the debate, have occupied many days. It is not to be expected that in a deliberative assembly the presentation of a large volume of testimony and of articles of impeachment would be followed by a vote at the dead of night and within a few hours after the presentation of the subject for consideration. All the impeachment proceedings which were conducted prior to 1872 occurred before the days of the long distance telephone, and rapid transit was a thing still undreamed of. In those days impeachment was considered a matter of such seriousness that weeks and months elapsed before resort was had to that drastic remedy. There was, therefore, a strong reason why the subject of impeachment should not be treated as *sui generis*.

As bearing on the interpretation to be given to this addition to the Constitution (if interpretation has any office to perform with respect to so lucid an ordinance) it is important to bear in mind that when the commission of 1872 met, this State had just passed

through a unique experience with respect to the subject of impeachment. Five proceedings had but shortly before been completed which dealt with the removal from office of high officials; the trial of Judge Smith, of Herkimer county, of Mr. Dorn, Canal Commissioner, of Judge Barnard, of Judge McCunn and of Judge Curtis. Never before in the history of any state of the Union had the public attention been so persistently directed to the removal from office of important functionaries by the action of one or both houses of the Legislature than at this very time. In 1868 took place the trial of the most important impeachment in history — that of Andrew Johnson. In the same year occurred the remarkable impeachment of Governor Reed of Florida which attracted widespread interest (1 Foster on the Const., p. 679 et seq.). Governor Clayton of Arkansas was impeached and Governor Butler of Nebraska was convicted on an impeachment at about the same time, and in 1872 came the second impeachment of Governor Reed.

It would be presumptuous even to suggest that the distinguished public men who composed the commission of 1872 should, in the face of these facts, have overlooked or forgotten that the impeachment or removal from office, even of Governors, was a subject with which the Legislature might be called upon to deal.

The fact, therefore, that they chose to limit the power of the Legislature and of the Senate at an extraordinary session in the manner that they did, employing the phraseology which they adopted, makes it evident that they acted with full appreciation that, unless the Governor recommended action on the subject of removal from office or of impeachment in a communication to the Legislature, that subject was to be excluded from legislative consideration to the same extent as any other business would be excluded, which he did not specifically bring to the attention of the Legislature or of the Senate.

Under the Constitution as it had stood previously, the Governor had the power to convene the Legislature or the Senate only on extraordinary occasions. There was a reason for permitting this to be done with regard to the Senate only which did not apply to the Assembly. Many appointments to office can only be made

by the Governor by and with the advice and consent of the Senate, and it was therefore desirable that to enable the public business to be carried on without let or hindrance the Senate should be called together for the purpose of acting on such appointments. The very fact, however, that it was expressly permitted that the Senate might be convened alone, in extraordinary session, and that there was no provision which permitted the Governor to call the Assembly alone to convene on an extraordinary occasion, presents a formidable reason for the argument that it was not intended that the Assembly should at any time be convened alone, and that if convened as a part of the Legislature at an extraordinary session it could act only on such such subjects as were recommended to it by the Governor. Hence, without his recommendation, the subject of impeachment could not be taken under consideration by it.

I shall not now discuss the question as to whether or not it would be likely that the Governor would recommend the consideration of his own impeachment. That phase of the case will be taken up at a future stage of the discussion.

I wish to emphasize, however, that the Governor is only one of the many public officers who can be proceeded against by impeachment. There are one hundred Supreme Court justices, ten judges sitting in the Court of Appeals, upwards of sixty county judges, almost as many surrogates, and numerous executive State officers. We must therefore consider the language of the Constitution in its application to all of these numerous public officials.

It is believed that New York was the first of the states which undertook to limit the power of the Legislature at an extraordinary session. In Appendix A, I have furnished a transcript of the Constitution of the several states which refer to special sessions of their Legislatures, and which it is believed will throw a flood of light upon the meaning of the language contained in our Constitution and will sustain the correctness of the interpretation which I am now seeking to give it.

The effect of provisions in the Constitutions of other states of cognate character, on the interpretation of similar provisions

in our Constitution, is admirably discussed by Mr. Justice Bockes in People ex rel. Bush v. Thornton, 25 Hun 466, 467, as follows:

"In England bribery in procuring an office created a disability to hold it (5 and 6 Edw. VI Chap. 16; and 49 Geo. III, Chap. 126). In Iowa it is provided by law that an election to a county office may be contested 'when the incumbent has given or offered to any elector . . . any bribe or reward in money, property or thing of value for the purpose of procuring his election.' Carrothers v. Russell (*supra*) was decided in view of that statutory provision. In Kansas it is declared by constitution that no person guilty of giving or receiving a bribe, . . . shall be qualified to vote or to hold office. The case of the State v. Stevens (23 Kan. 456) was a proceeding for mandamus and has no application to the question of disability here under examination. In Oregon it is declared by Constitution that every person shall be disqualified from holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to procure his election. It was in view of this provision that the State v. Dustin (*supra*) was decided. In Wisconsin the statute declares a disqualification to hold office against such persons as should obtain it by bribery; and in Ohio disqualification is declared by law. Research has not been further extended, and it may be that similar constitutional or legislative inhibitions may exist in some other states of the Union. We have not in this State any similar provision, either in the Constitution or laws. It may be here pertinently asked, What need of expressly declaring this inhibition in those states if it existed there, as it claimed to exist here, without so declaring it? The disability was doubtless made constitutional in some states and was declared by law in others, under the belief, well founded, too, as we think, that it was necessary to make such express declaration and provision in order to create the disability thus pronounced. We are cited to no case in which it has been held that disability to hold office exists in the absence of a constitutional or legislative provision so declaring."

These constitutional provisions, as by reflected light, enable us to understand and appreciate the all-inclusive character of the cognate clause in our Constitution. In some of them it is provided that there shall be no legislation upon subjects other than those designated in the proclamation of the Governor. In others, that no other business than that specified in the Governor's proclamation shall be transacted.

In still others "no other business shall be transacted than that named in the proclamation"; or the Legislature, when convened, shall have no power to "legislate on any subjects" other than those specified; or the Governor shall have power to convene the Legislature for "the transaction of executive business"; or the Legislature shall "transact no legislative business" other than that for which it is specially convened. Again it is provided, that no laws shall be enacted at called sessions "except such as shall relate to the object stated, or the objects specially enumerated."

The Constitution of Mississippi provides that the Legislature, when so convened, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the Governor or by which the session is called, except impeachments and examination into the accounts of state officers.

There is of course a manifest distinction between a prohibition against legislation and one against acting on any subject whatsoever, other than that recommended by the Governor, and the significant fact that the framers of the Constitution of Mississippi, which was undoubtedly modeled upon the Constitution of New York, found it necessary to except impeachments from the effect of the language which was borrowed from our Constitution, in order to enable the Legislature, without regard to the action of the Governor, to deal with that subject, absolutely demonstrates that, but for such exception, the institution of an impeachment at an extraordinary session without the Governor's recommendation, would have been prohibited.

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Mr. Marshall.— May it please the Court: At the time of adjournment on Friday I was engaged in the discussion of that

clause of the Constitution which relates to the powers of an extraordinary session of the Legislature, and in the course of that discussion I had just reached that clause in the Constitution of Mississippi which had been modeled upon our constitutional provision and showed that it had been found necessary, in order to enable an extraordinary session of the Legislature to consider the subject of impeachment, to except from the language which had been lifted, as it were, from our Constitution into that of Mississippi, the subject of impeachment.

Since the adjournment I have had occasion to give further study and consideration to that subject and have learned, at least to my satisfaction, how it came that the Constitution of Mississippi was so amended and contained the clause to which I have just referred, and why it was deemed necessary to adopt that phraseology. Although I was aware of the two impeachment cases in which Governor Harrison Reed of Florida was involved, I had not had access to the full text of the opinions of the judges of the Supreme Court of Florida, to whom had been referred various questions relating to those impeachments. This opportunity has now been afforded. In view of the fact that those proceedings strongly illuminate the subject with which we are now dealing it will be useful to indicate why the Constitution of Mississippi was amended as it was, and what was in the minds of the members of the commission of 1872 which framed this provision of the Constitution, that body presumably having before it during its deliberations, the two proceedings against Governor Harrison Reed, one of which occurred in 1868 and the other in 1872.

The first impeachment is dealt with in what is called In the Matter of the Executive Communication of the 9th of November, 1868, and is reported in the 12th of Florida Reports, at page 633.

Judge Werner.—Am I right in assuming that the Constitution of 1874 contained the first provision limiting the powers of the Legislature in extraordinary session?

Mr. Marshall.— In the State of New York. Before that there had been no limitation in our Constitution upon the power of the Legislature when convened in extraordinary session. I had supposed that our Constitution really was the first Constitution which contained any clause which limited the powers of the Legislature in extraordinary session, but I find that the Constitution of Florida had, prior to 1872, in fact previous to 1868, contained such a limitation. That is the subject which I will now take up.

Governor Reed, in accordance with the Constitution as then in force, asked for the opinion of the Supreme Court, which then consisted of three members, as to the interpretation of the provisions of the Florida Constitution bearing on his impeachment. It was shown that an extraordinary session of the Legislature had been convened at the capitol on November 3, 1868, by virtue of a proclamation of the Governor. The provision of the Constitution relating to such session, then in force, read as follows:

> "The Governor may on extraordinary occasions convene the Legislature by proclamation, and shall state to both houses, when organized, the purposes for which they have been convened, and the Legislature then shall transact no legislative business except that for which they are especially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in session, except by the unanimous consent of both houses."

The Constitution also provided that "the legislative authority of this state shall be vested in a Senate and Assembly, which shall be designated as the Legislature of the State of Florida, and the sessions thereof shall be held at the seat of government of the state." And still another section provided that "a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members in such manner and under such penalties as each house may prescribe."

It was shown that the Senate of Florida consisted of twenty-four members; that at the time when the extraordinary session convened the seats of four of the senators had been vacated and declared vacant; that the Assembly voted to impeach the Governor, but that at the time when it assumed to present the articles of impeachment to the Senate there were but eight senators present, a quorum being twelve.

Two questions were presented for decision, first, whether there had been convened under the proclamation of the Governor, in extraordinary session, a Legislature of the state, consisting of a Senate and Assembly, vested with the legislative authority of the state and competent to transact legislative business, and second, whether a Legislature, consisting of a Senate and Assembly, duly organized and vested with the legislative authority of the state, convened in extraordinary session under the proclamation of the Governor, and under the Constitution, competent to transact specified legislative business only, could proceed with the impeachment of the Governor in the absence of a recommendation.

It was shown that the Governor had not in his proclamation called the session for the purpose of dealing with his impeachment, and he had not called to the attention of the Legislature, while in session, any other legislative business, save that for which it was especially convened by his proclamation.

The court was unanimously of the opinion that, inasmuch as no quorum of the Senate was in attendance on the presentation of the articles of impeachment, the extraordinary session of the Legislature had not been constitutionally organized, and could not, therefore, act on any subject.

The subject of impeachment therefore could not be dealt with at the extraordinary session because it had not been convened as a Senate, as an Assembly and as a Legislature. This was manifestly an indication that the subject of impeachment could only be dealt with as a subject of legislation and only when both houses were in session, both having a quorum. Hence it was de-

cided that the proceedings relative to the calling of an extraordinary session were null and void; functus officio as it were, and that there was no Legislature because the Senate was without a quorum.

In view of this decision which is fortified by authority, the court did not find it necessary to consider the question as to whether or not the Governor could be impeached at an extraordinary session under any circumstances. Chief Judge Randall, however, concluded his opinion by saying:

> "We are, therefore, of the opinion that even upon the assumption that the proceeding of impeachment is not properly legislative business and that it may be presented at a called session, without the actual express consent of both houses, there has not been an effective impeachment and suspension from the performance of official duties."

It is to be observed that the Constitution of Florida merely prohibited the Legislature from transacting "legislative business" other than that for which it was convened, at an extraordinary session. The limitation on the action of the Legislature was, therefore, narrow, and not broad and comprehensive, as that of our Constitution.

This was decided in 1868. The subject of impeachment was there considered; the subject of the power to impeach at an extraordinary session was involved. Our constitutional commission met in 1872 and that year framed our provision, presumably having before it the Florida Constitution, since that was one of the few contemporary Constitutions which contained provisions relating to extraordinary sessions. It is inconceivable that the commission was not aware of the case, which was of public notoriety, in which the right of impeachment at an extraordinary session of the Legislature was before the Supreme Court of Florida for consideration and therefore when the commission adopted the phraseology it did, it must be deemed to have declined, advisedly, to confer the power of impeachment upon the Legislature while sitting at an extraordinary session.

The second impeachment of Governor Reed is only historically interesting, as throwing a sidelight upon this case, though not a very important one. It is reported under the title: "In the Matter of the Executive Communication filed on the 17th day of April, 1872, in 12 Florida Reports, p. 289." This was also a proceeding which took place just prior to the meeting of our constitutional commission of 1872. There, Governor Reed, who seems to have been a political storm center, again asked the Supreme Court for its opinion as to his official status, the court consisting of the same members as those who had acted on the prior occasion. It then appeared that at the regular session of the Florida Legislature held in 1872, the Assembly, in due form, impeached the Governor, and presented the articles of impeachment to the Senate. That, it will be noted, was at a regular session. The Constitution at that time declared that any officer, when impeached by the Assembly, should be deemed under arrest and disqualified from performing the official duties of his office, but any officer so impeached might demand his trial by the Senate within one year from the date of his impeachment. It was admitted that under the terms of this Constitution the impeachment necessarily disqualified the Governor from performing the duties of his office, and the only question presented was as to whether or not he had been acquitted by the Senate, so that he was entitled to resume the performance of his official duties.

The facts bearing on this point were, that at the time fixed for the trial of the Governor he interposed an answer to the articles of impeachment, to which there was a replication. A resolution was then offered that the court adjourn, in accordance with a concurrent resolution of the Assembly and Senate for their adjournment on that day. This was not adopted. The Governor then filed a protest against further delay, and especially against delay or continuance until an impossible day or time, within which his office would have expired. After that he moved that the court require the managers to proceed with the evidence, or that he be acquitted and discharged. This motion was not acted upon. A motion was then offered by a senator that the court adjourn. The record of the Senate showed that this order was adopted, but it was nevertheless followed by the offer of a motion by a senator as a

substitute for the previous one to adjourn, that the court should sit from day to day from ten o'clock each day, for the trial of the respondent. The record did not show whether or not this was adopted. At all events, it was followed by a motion to adjourn, and an adjournment was taken in general terms, specifying no time; and on the same day the Assembly, on motion, adjourned sine die for the session, and until the period when under the Constitution the next session of the Senate began.

It appeared, therefore, that the court, after failing to act on the motion to acquit and discharge the prisoner, simply adjourned and that the Senate on the same day adjourned for the session.

The question, therefore, which it was necessary for the court to determine, and the only one over which it had jurisdiction was whether or not this action of the Senate operated as a termination of the impeachment proceedings and as an acquittal of the respondent. It was decided that the Senate, being a court, and having rendered no judgment, dismissing the proceedings or directing the acquittal of the prisoner, he was still under impeachment, even though the result of such action was to deprive him of the office to which he had been elected, without trial.

Chief Judge Randall dissented from this conclusion.

It is thus evident that the second impeachment of Governor Reed has no bearing upon the question we are now considering, except historically, and by way of suggestion of the possibilities which might ensue from the adoption of the contention of the impeachment managers. Thus, for instance, should they attempt to amend the articles of impeachment, and submit new articles of impeachment, to which it would be necessary to interpose an answer, it is possible that delays might occur which would extend the trial during the entire term of the office of the Governor, and under our Constitution as it has been interpreted, he would during that entire period be disabled from performing the duties of his office. The impeachment proceedings of 1868, however, afford historical evidence of what must have been in the minds of the framers of our constitutional provision, and what must have been in the minds of the framers of the Mississippi Constitution, which led the latter to make special provision for impeachment at an extraordinary session of the Legislature.

In this connection it is also useful to point to two provisions of the New York Constitution, in which it was found necessary to make explicit exception with respect to impeachments, just as the Constitution of Mississippi did in the clause which we are now considering, indicating that such exception was deemed necessary to prevent the application of the general provisions of the Constitution to cases of impeachment.

In article 1, section 6 of the Bill of Rights, it is declared:

> "No person shall be held to answer for a capital or other infamous crime (except in cases of impeachment, etc.) unless on presentation or indictment by a grand jury."

Care was taken in that clause to see to it that there should be an exception made in case of impeachment. Out of abundance of caution, in spite of the fact that there was contained in the Constitution a provision which related specially to the subject of impeachment, and which specified the manner in which impeachments were to be tried, it was considered necessary to make an explicit exception in respect to impeachments in the clause just quoted.

Is it not significant that, although section 13 of article 6 of our present Constitution, and section 1, article 6 of the Constitution of 1846, contained full provisions on the special subject of impeachments, yet, side by side with them there was contained in the Bill of Rights this exception with regard to the method of trial or the presentation of a charge in the case of impeachment?

Again in article 4, section 5 of the Constitution, relating to the powers of the executive, it is provided:

> "The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offences except treason and cases of impeachment."

Here again, notwithstanding the specific language of article 6, section 13 with regard to impeachment, it was deemed necessary to except impeachments from the provisions of the Constitution relating to reprieves, pardons and commutations.

When, therefore, in article 4, section 4, which immediately precedes that which relates to pardons, we find that, with regard

to extraordinary sessions of the Legislature, it is declared that "no subject shall be acted upon except such as the Governor may recommend for consideration," the omission of any exception such as that found in the Constitution of Mississippi with regard to impeachment, such as is inserted in the Bill of Rights and in the section in regard to pardons which immediately follows the section relating to extraordinary sessions, must it not have been the undoubted intention of the framers of the Constitution, that the subject of impeachment was included in the universal phrase, the categorical negative, contained in the section now under consideration? The framers of the Constitution of 1894 could not have looked at section 4 of article 4, which was amended by the commission of 1872, and which the Legislature passed upon at two consecutive sessions before it was submitted to a vote of the people, without at the same time having their eyes directed to the word "impeachment" on the very same page. Hence the omission of words of exception from section 4 of article 4 and their insertion in section 5 of article 4 speaks volumes as to the intention of the framers of the Constitution, especially when one considers the care exercised by the commission of 1872 and by the constitutional convention of 1894.

In this connection, although it perhaps is a little out of the regular order, I venture to refer to a suggestion made to me by one of my associates with regard to the language of section 4 of article 4, "no subject shall be acted upon," namely, that if this body were now to resolve itself into a constitutional convention, and were called upon to frame a clause which would define the powers of the Legislature at an extraordinary session, if it intended to select a form of expression which would comprehend everything and omit nothing, including the subject of impeachment, it would find it impossible to find any words in the English language which would accomplish that result so effectually as the language contained in the present Constitution, and I might add that if it were intended to except "impeachment" from the effect of that language there is not a member of this Court sitting in such a constitutional convention, who would not deem it imperative to express such exception in precise and unambiguous language which would plainly and explicitly declare such intention.

I will now resume a consideration of the cases bearing on the

interpretation of various constitutional provisions relating to extraordinary sessions which the courts have been called upon to determine in various decisions. On Friday I was about to refer to the case of People v. Curry, 62 Pac. Rep. 516, s. c. 130 Cal. 82. There a question arose as to whether the Legislature could, at an extraordinary session, without the sanction of the Governor's proclamation, propose an amendment to the Constitution. It was held that even though the proposal of an amendment to the Constitution is made by the Legislature as an ordinary enactment of the law, it nevertheless could not, under the provision which limited its activity at an extraordinary session, propose such an amendment. Mr. Justice Van Dyke said:

> "By the Constitution the sessions of the Legislature shall commence on the first Monday after the first day of January next succeeding the election of its members, and shall be biennial, 'unless the Governor shall in the interim, convene the Legislature by proclamation' (article 4, section 2). The Constitution, under the article in reference to the executive department, in defining the duties of a Governor, provides that 'he may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it; and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto' (article 5, section 9).
>
> "The attorney general contends that proposing constitutional amendments is not 'to legislate on any subjects other than those specified in the proclamation,' and therefore does not fall within this provision of the Constitution. It may be admitted that proposing constitutional amendments is not legislation in the sense of passing statutory laws, but it is nevertheless performing a legislative function. It is one of the modes pointed out to initiate the enactment of constitutional law. The performance of such a duty is neither executive nor judicial, but purely legislative. No one would contend that the Senate and Assembly could propose constitu-

tional amendments, except at the session of the Legislature and while it is in session, and not before or afterwards; that is, both houses in session, which constitute the Legislature. . . .

"The Governor takes no part in the adoption of freeholders' charters, any more than in proposing constitutional amendments; yet the adoption of a city charter in the mode provided is legislation, although not in the same manner as passing bills. It creates, or participates in creating, a municipal government, which can only be done by legislative power. It will hardly be contended that the action of the two houses of the Legislature in approving or adopting a freeholders' charter can be done at an extra session, when that subject is not specified in the Governor's proclamation. People v. Blanding, 63 Cal. 333, does not sustain the contention of the appellant. That was a case of the confirmation by the Senate of an appointee of the Governor; and it is said that the provision in the Constitution in reference to legislation other than that specified in the proclamation does not apply in such a case, that being the independent action of the Senate, and not in the nature of legislation at all. It frequently occurs that the Senate of the United States is convened, without calling together Congress, for the purpose of confirming presidential appointments. Particularly is this the case on the coming in of a new administration. The other cases referred to by the attorney general, such as Hatch v. Stoneman, 66 Cal. 633, 6 Pac. Rep. 734, and Mullen v. State, 14 Cal. 578, 46 Pac. Rep. 670, 34 L. R. A. 262, simply hold that the proposal of amendments to the Constitution is not made by the Legislature as in the ordinary enactment of a law.

"The evident purpose of the restriction placed upon the action of the Legislature when called together in extraordinary session by proclamation was to regulate the duration of such session, and thus diminish expenses, and the court should not, by a strained or strict construction, defeat these purposes. We are therefore of the opinion, for the

reasons stated, that the proposed constitutional amendment proposed at the extra session of the Legislature of 1900 is invalid, and that the defendant, as Secretary of State, is justified in certifying the amendment proposed at the regular session of 1899 in lieu thereof."

While in People v. Blanding, 63 Cal. 333, to which reference has just been made, it was held that the prohibition against legislation did not cover the act of confirmation by the Senate of an appointee of the Governor, the Constitution of New York is so framed that unquestionably such action would come within the prohibition of our Constitution, which, as has been repeatedly pointed out, is not confined to legislation, but to action on any subject.

In Wells v. Missouri Pacific R. R. Co., 110 Mo. 286, s. c. 19 S. W. Rep. 531, 15 L. R. A. 847, at an extra session of the Legislature a bill was passed for the prevention of accidents to railroad employees. It was not a subject which had been recommended for action to the Legislature. The Governor subsequently approved the bill. It was nevertheless held that it was unconstitutional, on the ground that its subsequent approval was not a valid substitute for his designation of the subject of such legislation in his proclamation calling the session. Mr. Justice Barclay, after stating the facts with regard to the passage of the act then under consideration, said:

"Is it, therefore, to be pronounced void? That depends in the legal energy to be ascribed to those parts of the Constitution first above quoted. In them, as in some other portions of that document, the people have seen fit, for satisfactory reasons, to place limitations upon the full use of legislative power. They have commanded, in the most solemn manner, an observance of certain forms in the process of legislation, because (we may assume) they were led by experience to believe those forms conducive to better results than had been otherwise attained. It is not for us to question the reasons of that policy, or to construe the life out of their deliberate act. When they have said, as in the language before us, that 'the General Assembly shall have

no power . . . in extra sessions . . . to act upon subjects other than those specially designated,' etc., it is our duty to give effect to that statement. To hold such language is merely directory would amount, in substance, to amending the instrument so as to import that the assembly should have no such power unless it assumed that power. Such a reading, we conceive, would reduce the command to a dead letter, and virtually eliminate it. It is a reading we do not feel at liberty to adopt, however great the respect we entertain for the Legislature.

"The power of construing the Constitution must necessarily be lodged in some department of government to insure that practical sanction of its mandates which is essential to preserve their vitality and force. This delicate and sacred trust is devolved upon the judiciary as a manifestation of the political principle that ours is a government of laws, rather than of men. In exercising that power the court should take a large and comprehensive view of constitutional language, mindful that 'every scripture is to be interpreted by the same spirit which gave it forth,' and with a deep desire to enforce its full and exact meaning. Thus viewing the very definite provision before us, we cannot regard it otherwise than as mandatory. When the people have declared a certain form indispensable to the proper expression of their will, it is no part of our function to adjudge that form unnecessary or immaterial. On the contrary, our bounden duty is to enforce that declaration. It follows that the 'Act' in question cannot be sustained as a constitutional exertion of the lawmaking power. That position being reached, it is immaterial that the Governor, by his formal signature, in due course, approved the bill after its passage by the General Assembly. By the terms of the Constitution the legislative power to act in the premises depended on the Governor's taking the initiative by a proclamation or a message. His subsequent approval cannot be accepted as a substitute for those earlier steps which the fundamental law prescribes. Davidson v. Moorman (1871), 2 Heisk. 575; St. Louis v. Withaus (1887), 90 Mo. 646, 6 West. Rep. 229."

To the same effect are Manor Casino v. State, 34 S. W. Rep. (Tex.) 769; Re Governor's Proclamations, 35 Pac. Rep. (Col.) 530; Ex parte Caldwell, 138 Fed. Rep. 492; Neilsen v. C. B. & Q. R. R. Co., 187 Fed. Rep. 394.

People ex rel Carter v. Rice, 135 N. Y. 473, related to the validity of the apportionment act of 1892, adopted at an extraordinary session of the Legislature called by Governor Hill, who recommended the Legislature to pass such an act. The Constitution provided for the enumeration of the inhabitants decennially and for an alteration of the Senate districts and apportionment of members of Assembly at "the first session after the return of every enumeration." A question arose as to whether or not an extraordinary session was to be deemed the "first session" of the Legislature, within the meaning of this constitutional provision. In the course of his opinion Judge Peckham said:

> "The Constitution provides for the assembling of the Legislature on the first Tuesday in January in each year. When it adjourns sine die, has not the session of the Legislature ended? The term of office of its members may not have ended, but the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid act unless the Governor, under the special power given him by the Constitution, should convene it. When thus convened the Legislature is in session, and it is clearly not the same session which was ended by a prior adjournment thereof, without day. . . . If the Governor should call such a session and not recommend this subject for consideration, it might then be a question which of the two constitutional provisions should prevail, and which provided for the passage of the apportionment act at the first session, or the one which provided that at an extraordinary session the Legislature should consider no other subject than such as should be recommended to it by the Governor. If the former provision should be held to prevail, the act could be passed, and if the latter, it could not. In such case the extraordinary session would not be the first session of the Legislature within the meaning of the Constitution. Admitting that unless the Governor recommended the consideration

of the subject to the Legislature at the extraordinary session called by him, an apportionment act could not then be passed, it by no means follows that the Legislature could not pass the act at such extraordinary session, provided the subject were recommended to its consideration by the Governor. In the one case the extraordinary session is not the first session after the return of the enumeration within the meaning of the Constitution, and in the other case it is."

It is significant that the Constitution of 1894, in dealing with the subject of enumeration and reapportionment, both in section 4 and in section 5 of article 3, provided for the alteration of Senate districts and the apportionment of members of Assembly by the Legislature "at the first regular session after the return of every enumeration." This is a plain manifestation of the intention, that the powers of the Legislature at an extraordinary session should be circumscribed, so that even the important political function of apportionment should be exercised at a regular session only, and not at an extraordinary session of the Legislature. Thus even the Governor is limited in his designation of subjects which may be acted on at an extraordinary session of the Legislature.

So that the effect of the work done by the constitutional convention of 1894 was to limit further the powers of the Legislature at an extraordinary session, the attention of the convention having been called to the situation which arose in consequence of the fact that Governor Hill called an extraordinary session for the purpose of at that time taking up the subject of the apportionment of the State pursuant to the enumeration which had just preceded it.

As further bearing on the question as to what may be done at an extraordinary session of the Legislature, attention is called to article 6, section 11, of the Constitution, which provides:

"Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices

of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. . . . "

Would it be contended for an instant that, in the absence of recommendation by the Governor, judges of the Court of Appeals or justices of the Supreme Court could be removed by concurrent resolution at an extraordinary session of the Legislature, or at a self-convened session?

The practical interpretation of this provision of the Constitution indicates that the negative is the accepted answer to this query. Governor Higgins found it necessary to recommend to the Legislature of 1905 the consideration of the charges against Mr. Justice Hooker and at the present extraordinary session of the Legislature of 1913 Governor Sulzer found it necessary to recommend action by the Legislature at that session upon the charges which had been presented against Mr. Justice Cohalan.

As further bearing upon this subject I shall now call your attention to a practical interpretation, as it were, of the Constitution with regard to impeachment proceedings against the Governor, which is to be found in the debates of the constitutional convention of 1846.

It there appears that on the 14th of July, 1846, the sixth section of the article on the executive came up for consideration. This section as submitted by the committee on the executive reads as follows:

> "In case of the impeachment of the Governor or his removal from office, death, inability from mental or physical disease, resignation, absence from the State, the powers and duties shall devolve upon the Lieutenant Governor for the residue of the term or until the Governor, absent or impeached, shall return or the disability shall cease. . . ."

In relation to this proposal, Mr. Nichols said that the Governor, in a fit of mental alienation, in a spring or summer might, in a very philanthropic mood, might pardon all the convicts in the prisons and, if his insanity was to be determined only by the

Legislature (as was suggested) he might, when bereft of his reason, do this and much more mischief during the six months which would intervene before the meeting of the Legislature.

Then Mr. Stow suggested this clause:

> "The Legislature may declare the inability of the Governor or the person administering the duties of the office of governor by a vote of four-fifths of all the members elected to each house and for this purpose the Chief Justice of the Supreme Court may convene the Legislature."

Later Mr. Stow renewed his proposition, modified so as to give two-thirds of the Legislature power to decide on the question of inability when the Governor should be considered incompetent, and giving the speaker of the Assembly power to convene the Legislature for that purpose. Mr. Stow said he never could consent to leave the word "inability" there without providing some tribunal for ascertaining it. It was such a question as this that shook the British throne to its center, because they did not provide means to decide when the king was disabled. The safest tribunal he could devise was the Legislature, by a two-thirds vote. He was loath to take up time by a single remark, but he could not consent to involve the country in danger of revolution because it might take a little time to make provision for this contingency. The amendment was rejected.

So even at that time, the desirability and possible necessity of making some provision for dealing with the Governor if his mental or physical condition became such as to require consideration, was not overlooked. It was, however, concluded that it was not advisable to provide for even such a contingency and that it was better to wait until the next session of the Legislature should convene before taking action even in so extreme a case.

The practical interpretation given to the provision of the Constitution now under discussion indicates that, ever since 1875, it has been the uniform practice of the various Governors of this State, who had occasion to call extraordinary sessions, specially to recommend for action by the Legislature, not only subjects for legislation, but also all other subjects as to which action was desired.

Such interpretation is a potent factor even in the ascertainment of the meaning of a clause of the Constitution. People ex rel. Einsfeld v. Murray, 149 N. Y. 376; People v. Home Insurance Co., 92 N. Y. 337.

In 1888, Governor Hill recommended that the Legislature take action with regard to the employment of convict labor in penal institutions of the State. The question was raised whether, under the terms of this recommendation, the Legislature had the power to consider the employment of convict labor other than that of convicts in State prisons. Thereupon Governor Hill presented a further recommendation, that the question of the employment of convict labor be considered not only in connection with State prisons, but also in jails, penitentiaries and other similar institutions.

In 1898, Governor Black recommended the passage of a State election law, and inasmuch as, under that law, it becomes his duty to appoint a State Superintendent of Elections, the Governor specifically recommended action with regard to the appointment and confirmation of such State superintendent.

In 1905, Governor Higgins recommended an examination by the Legislature into the charges presented against Mr. Justice Hooker.

In 1908, Governor Hughes recommended to the Legislature, then in extraordinary session, the advisability of taking action in connection with the ceremonies for the interment of the remains of George Clinton, which were removed from the Congressional cemetery in Washington, to Kingston.

In 1913, the Legislature, upon the recommendation of Governor Sulzer, took action with regard to the accusations made against Mr. Justice Cohalan.

He, as other Governors had done before him, submitted to the Senate while sitting in extraordinary session, the names of various nominees for public office, for confirmation.

Whenever an extraordinary session has been held, not even an appropriation bill to cover the expenses of the session has been attempted to be passed except on the specific recommendation of the Governor.

There is not to be found in the history of any of the states an

instance of the institution of impeachment proceedings at an extraordinary session of the Legislature, other than those taken against Governor Reed of Florida, which I have fully explained. It has been recently claimed that the impeachment of Governor Butler, which occurred in Nebraska in 1865, took place at an extraordinary session, but in an article by Albert Watkins, the historian of the Nebraska State Historical Society, which recently appeared in the New York Times, it is shown that this was not the fact, but that the impeachment took place at a regular session of the Legislature.

It is likewise true that there never has been an impeachment when the Senate and Assembly in this State were not actually in session, nor is there a precedent in England when there was an attempt to impeach when both houses were not actually in session. The necessity therefor is admirably illustrated by the first impeachment of Governor Reed.

But it is argued that, when the Assembly exercises the power of impeachment, it acts judicially. While in one sense it may be said that, by voting an impeachment, it is setting the judicial machinery in motion, in that articles of impeachment must precede the trial of an impeachment; yet, as has been seen from the authorities already considered, an impeachment is merely the equivalent of an indictment, and the Assembly, when it makes its accusation in the form of an impeachment, is performing no other or different function than those exercised by a grand jury when it finds an indictment. When a grand jury finds an indictment, it does not act judicially, any more than, in those jurisdictions where informations have taken the place of indictments, the filing of an information by a district or state attorney can be said to be a judicial act.

In United States v. Belbin, 46 Fed. Rep. 381, Judge Hughes said:

> "The function of a grand jury is not to try persons accused of crime, but merely to examine whether and what crimes have been committed, to designate the persons at whom the evidence points as criminal, and, by indictment, to charge such persons before the court and county as answerable for the crimes which have been committed. Originally grand

> jurors were chosen for the purpose of giving testimony to their fellow-jurors, as to the crimes committed within the county. . . . The grand jury does not try; it merely accuses with a view to trial."

As said by Blackstone, "The Commons accuse, the House of Lords judges."

The Assembly, with respect to an impeachment, and the grand jury, with respect to an indictment, perform the function of accusers, and their act is administrative and not judicial. It does not constitute a judgment. It does not require the accused to be heard. It can proceed without notice to the accused. It is only a step in the process of conferring upon the tribunal which is to try the indictment or the impeachment, jurisdiction of the subject matter.

The very oath administered to the members of this Court indicates that the Assembly cannot possibly be considered as acting otherwise than as accuser, as a party, not as a judge. The solemn oath administered here at the opening of this trial to every member impressively declares:

> "I do solemnly swear to truly and impartially try and determine the impeachment of the Assembly of New York against William Sulzer, Governor of said State, according to the evidence, so help me God."

It is the Assembly which appears against the Governor. It is the accuser. It is the party which is represented here as the accuser, and to say that it is acting judicially seems to be entirely at odds with the very conception of a judicial act.

In Sinking-Fund Cases, 99 U. S. 700–61, Mr. Justice Field said:

> "Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such an act is to that extent a judicial one, and not the proper exercise of legislative functions."

In People v. Murphy, 65 App. Div. 126, it was said that by "judicial act" is meant the power to hear and determine controversies between adverse parties, or questions in litigation.

In Supervisors of Onondaga County v. Briggs, 2 Denio 26, 32, it was said to be the performance of a duty which has been confided to judicial officers to be exercised in a judicial way.

A judicial act must be an act performed by a court touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers. State v. Tippecanoe County, 45 Ind. 501, 506; Schoultz v. McPheeters, 79 Ind. 373, 377.

Or, as it was expressed in Rhode Island v. Massachusetts, 12 Pet. 657, 718, "what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

The New York Code of Criminal Procedure, section 354, defines an indictment as an accusation in writing, presented by a grand jury to a competent court, charging a person with crime. People v. Dumar, 106 N. Y. 502, 506; People v. Flaherty, 79 Hun 48, 50.

The finding of an indictment or the voting of an impeachment, viewed in the light of these authorities, does not therefore constitute a judicial act, in any sense of the term.

But even if, by a stretch of the imagination, an indictment or an impeachment could be said to be a judicial act, it is difficult to appreciate the materiality of such a conclusion to the interpretation of the constitutional provision now under consideration. It does not create any exception to the limitation which the Constitution imposes upon the Legislature or upon the Assembly. It does not limit the restriction imposed upon them, with respect to action on subjects proper to be considered by them. It does not permit them to exercise judicial powers. It it can be conceived that the three great powers of government could at any time be exercised by the Legislature, or any branch of it, the language of the Constitution applies equally to legislative, judicial and executive action. It must be conceded that it applies to the appointing power, or to the power of confirming appointments to public office, and with that concession it is impossible to say that this constitutional provision was intended to be confined in its operation to subjects of legislation, and that there was no prohibition against

dealing with other subjects at an extraordinary session of the Legislature, when the Governor did not recommend such action.

The limitation upon the exercise of power at extraordinary sessions of either the Legislature or the Senate is not confined to the exercise of legislative power alone, for the Senate can under no circumstances exercise legislative power at an extraordinary session when it sits alone, by itself, without the Assembly. If, therefore, the limitation upon the power to act as applied to the Senate is not confined to legislation, how can it be so confined when applied to the Assembly when it is convened together with the Senate at an extraordinary session of the Legislature?

It clearly follows that the contention of the impeachment managers, that the limitation on the power of extraordinary sessions is a limitation upon action "along legislative lines," is fallacious.

The term "Legislature" as employed in our system of government, like the word "Parliament," implies a bicameral or, speaking biologically, a bicellular structure. The Senate and the Assembly, the House of Lords and the House of Commons are the constituent parts of a constitutional unit. Though the two houses of which our Legislature is composed rarely meet jointly, the only time when they do not sit together is when the Senate alone is convened to consider appointments proposed by the Governor. The very fact that provision is made for an independent session of the Senate only, and none which enables the Assembly to be convened independently, demonstrates that silence under such circumstances means negation; that expressio unius est exclusio alterius; that the Assembly when called to take part in an extraordinary session of the Legislature, of which it forms a component part, meets as a part or branch of the Legislature in connection with the Senate, and not otherwise, and cannot, therefore, initiate action on any subject at such a session.

The very fact that neither house shall without the consent of the other adjourn for more than two days (art. 3, sec. 11), indicates that, with the exception of the single instance when the Senate may meet alone when called in extraordinary session, the Assembly and the Senate must act together.

As a grand jury cannot sit except in connection with a court, so the Assembly cannot sit to discharge like duties, except in connection with the Senate, and when both are in session at the same time as branches of the Legislature. If the Assembly should meet spontaneously and find articles of impeachment, what could it do with them unless the Senate were in session?

That is shown by the decision in the case of Governor Reed. The Assembly was absolutely powerless, although it voted articles of impeachment, to have anything done with them or to make its action effective because the Senate was not in session with a quorum.

The theory of the Constitution is, that the Assembly can be in session only when the Senate is, and only as a part of the Legislature. The Senate is expressly authorized to sit alone, and at a time when the Assembly is not in session, but, as we have shown, only when called in extraordinary session by the Governor. The fact that the like power was not conferred upon the Assembly is irrefragable evidence that it was not intended that the Assembly should possess such power for any purpose.

Those are precedents which show that it has been considered in various bodies, that even the Senate, sitting as a court of impeachment, cannot act while the House is not in session.

In 3 Hinds Precedents of the House of Representatives, section 2006, it is stated that it was decided by the United States Senate, sitting as a court for the impeachment of William W. Belknap, the late Secretary of War, that the impeachment trial could proceed only when Congress was in session. On June 19, 1876, the counsel for the respondent asked for a postponement of the trial until some time in the following November. Thereupon a question arose as to whether or not the trial might proceed when the House of Representatives was not in session, and Senator Ingalls, of Kansas, asked for an opinion from the managers of the House of Representatives. It appeared that they were not agreed on the subject. Subsequently while an order was pending providing that the trial should proceed on July 6th, Senator Morton, of Indiana, proposed to add thereto as an amendment the following: "Provided that impeachment can only proceed in the presence of the House of Representatives." This mo-

tion was subsequently withdrawn by Senator Morton, whereupon Senator Conkling, of New York, offered the proviso in the form: "Provided that impeachment can only proceed while Congress is in session." That proviso was agreed to and was thereafter acted upon.

In Fowler v. Pierce, 2 Cal. 172, it was recognized as being necessary for the House to remain in session while the Senate sat for the trial of an impeachment.

The case of State ex rel. Adams v. Hillyer, 2 Kan. 11, which may be cited on this point by our opponents, has no bearing here. There it appeared that, on February 14, 1862, the House of Representatives impeached the respondent. The Senate was immediately notified and articles of impeachment were adopted and presented, and pleadings were interposed. On February 27, 1862, a resolution was adopted by the House requesting the Senate to postpone the trial to such time as the managers should deem necessary, and thereafter, on motion of the managers, the trial was postponed until the first Monday in June. After this adjournment, and in March, 1862, a joint resolution was passed adjourning both houses sine die. On June 2, 1862, the Court of Impeachment proceeded to trial, and the question was then raised as to whether the Senate had the power to sit for the trial of an impeachment when the House was not in session, and whether the adjournment of the Senate to the first Monday in June was without the consent of the House and, therefore, void.

It was held that the laws of Kansas expressly empowered the Senate, when sitting as a court for the trial of impeachments, to hold sessions after the adjournment of the Legislature. Hence the court said that, whatever might have been the rule at the common law, in the absence of a constitutional prohibition the court could proceed to try the impeachment even though the House was not present.

It was further held that there was no inhibition in the Constitution as to one branch of the Legislature meeting when the other was not in session. There was a fixed time when both houses should meet and a limitation of the power of one house to adjourn for a longer period than two days without the consent of the other, and in case of disagreement the Governor might ad-

journ them. But this was held not to be applicable to the proceedings of the Senate while trying an impeachment, because then it was acting entirely in a judicial capacity; its action was independent of the House. There was no reason why the House should be present or in session, and there being no constitutional inhibition, there was no reason why the Senate with the consent of the House might not adjourn to any period during its term of office not beyond the regulation meeting of the Legislature, whether the House was in session or not. If at such adjourned session its acts were confined to duties which were entirely independent of the House or any action it might take, those acts were valid and conclusive.

It was further held that the passage of the resolution by the House on February 26th, asking the Senate to set the trial for the first Monday in June, and the adjournment of the Senate sitting as a court until that time, could be viewed in no other light than as the consent of the House, previously given, to such an adjournment, and that when the Legislature adjourned sine die, it was evident that each branch of the Legislature considered the resolution with reference to the previous adjournment of the Senate sitting as a court of impeachment, as qualifying the resolution for the adjournment sine die.

The President.—Mr. Marshall, if I recollect correctly, the Assembly was not in session during the proceedings in Saratoga at which Judge Barnard was tried.

Mr. Marshall.—I think your Honor is correct. That was one of the precedents considered by Congress in the Belknap case.

The President.— I did not mention it by way of argument, but to see if my recollection is correct.

Mr. Marshall.— Your recollection is entirely correct, your Honor. But as I have stated, that is of no consequence here, because there the Assembly in regular session impeached and then presented the matter to the Senate while it was in regular session, and then the senators, or a major part of them, and a major part of the judges of the Court of Appeals, resolved themselves into a

court of impeachment and proceeded with the trial though the Assembly was not actually in session during the progress of the trial.

It will doubtless be argued that, under our interpretation, the Governor could not be impeached except at a regular session of the Legislature, since it would be unnatural for him to recommend to the Legislature, at an extraordinary session, the consideration of the subject of his impeachment. This, it is claimed, constitutes a reductio ad absurdum of our contention.

That, however, is a complete begging of the question. The mere fact that the framers of the Constitution have not provided for the contingency of the impeachment of the Governor at an extraordinary session does not deprive the clearly conceived limitations upon the powers of an extraordinary session of their undoubted significance or render them ineffectual in whole or in part.

In People ex rel. Bolton v. Albertson, 55 N. Y. 50, 55, Judge Allen said:

> "The restraints of the Constitution upon the several departments, among which the various powers of government are distributed, cannot be lessened or diminished by inference and implication; and usurpation of power, or the exercise of power in disregard of the express provision or plain intent of the instrument, as necessarily implied from all its terms, cannot be sustained under the pretence of a liberal or enlightened interpretation, or in deference to the judgment of the Legislature, or some supposed necessity, the result of a changed condition of affairs. (1 Kent's Com. 162; Barto v. Himrod, 4 Seld. 483; Taylor v. Porter, 4 Hill 144; Warner v. People, 2 Den. 272; People v. N. Y. C. R. R. Co., 24 N. Y. 485, Schenectady Observatory v. Allen, 42 id. 404.")

As to every officer in the State who is subject to impeachment, other than the Governor, the language of the Constitution can be given full force and effect, according to our interpretation; whereas, under that construction which the impeachment managers seek to impart to it, this language is deprived of all efficacy, so far as it concerns the impeachment of all of such officers, and renders the recommendations of the Governor with respect thereto mere idle ceremony, without significance or importance.

While it is true that, in the case of the Governor, there is no likelihood that he would recommend his own impeachment, yet the argumentum ab inconvenienti which is sought to be based on that circumstance is entitled to but little moment. As said by Pomeroy in his admirable work on Constitutional Law, "though often resorted to, it is but little used." The regular sessions of the Legislature are, as to duration, entirely within the control of the Legislature. Ordinarily they continue until June of each year. There would, therefore, be a period of not to exceed seven months during which the power to impeach the Governor would be suspended. It is most unlikely that the acts on which such impeachment may be based would arise immediately after adjournment. On the doctrine of averages, if such acts ever occurred, there would be a period of not to exceed three months between the time of their discovery and the meeting of the regular session of the Legislature. In the present case the time which will elapse between the date of the impeachment and the convening of the legislative session of 1914, is but four and one-half months. But even if it should happen that seven months would elapse before impeachment proceedings could be instituted, that would not justify the stretching of the Constitution to such an extent as is proposed in the present instance, and the doing of violence to the fair intendment of its language.

We have heard it stated that shocking conditions might result if this power of impeachment could not be exerted at an extraordinary session or at a self-convened session of the Assembly. Really the argument is that that power must exist at a self-convened session of the Assembly in order that these terrible consequences may be averted, because it rarely occurs that an extraordinary session of the Legislature is convened by the Governor. Only in recent years have our Governors called together the Legislature in extraordinary session with any degree of frequency.

It was contended by one of the deputy attorney generals in his argument before Mr. Justice Hasbrouck, that if this power of impeachment at extraordinary sessions or at a self-convened session did not exist, the Governor, on the very day after the regular session of the Legislature adjourned, could commit murder, or burn down the capitol, and he could not be impeached.

Though he could be indicted and sent to prison, it was argued that from his cell he could sign the pardon that would set him free. This is not only a highly fanciful situation, but it also involves an erroneous view of the law.

Certainly if the Governor committed a crime such as burglary, or any of the other shocking offenses which have been instanced, he would not be above the law. He would be subject to its penalties like any other man. He would be incarcerated, and thereupon the Lieutenant Governor under the interpretation given to section 1 of article 4 of the Constitution by Justice Hasbrouck, would exercise the functions of Acting Governor, and the State would be exempt from the calamity which has been pictured.

It is also absolutely wrong to say that in such a case the Governor could pardon himself. It is unthinkable that the Governor could in any case, or under any circumstances, pardon himself. The Acting Governor alone could exercise the pardoning power, or the power to grant commutations or reprieves after the conviction of the Governor or while the latter is deprived of the power to exercise the functions of his office. Before conviction the Governor could not pardon himself. The power to pardon conferred by the Constitution upon the Governor expressly refers to the exercise of power "after conviction." The moment he is convicted of any crime, under section 510 of the Penal Code, he automatically forfeits his office and could not by any possibility pardon himself. Therefore these calamitous possibilities which have been painted in such somber hues, are purely imaginary, and are, as is much of the argument of our opponents, in total disregard of the language of the Constitution and of the law.

The Governor, as has been shown, may in the exercise of his unlimited discretion refuse to call an extraordinary session of the Legislature, even when a conceded necessity therefor exists and the machinery of legislation must in such a case rest in idleness until the regular session begins. Would not such delay be infinitely more injurious to the State than that involved in the postponement until the regular session of action with respect to the impeachment of the Governor? Why, then, should so much stress be laid on the few months which may elapse before, in a case of rare occurrence, impeachment proceedings may be started?

Throughout our law there is recognized the desirability of enabling those in authority as well as the public to undergo the process of what is well characterized as "cooling time," so as to permit sober second thought to gain its soothing sway, and to avoid what the great Chief Justice described in Fletcher v. Peck, 6 Cranch 137, as "the violent acts which might grow out of the feelings of the moment," and we might add those which are artificially stimulated to compass the destruction of a political opponent.

The argumentum ab inconvenienti is one which is frequently fallacious, and is often more honored in the breach than in the observance. It has perhaps never been better criticised than it was in the leading case of Newell v. People, 7 N. Y. 9, where Chief Judge Ruggles, at page 109, said:

> "And I enter upon the examination thoroughly imbued with the principle that the task of determining that a law is void by reason of its repugnancy to the Constitution is at all times one of extreme delicacy; that it ought seldom, if ever, to be done in a doubtful case; that it is not on slight implication or vague conjecture that the Legislature is to be pronounced to have transcended its powers (Fletcher v. Peck, 6 Cranch 128); that it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that we can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment; that in construing the language of a Constitution we have nothing to do with arguments ab inconvenienti, for the purpose of enlarging or contracting its import, the only sound principle being to declare ita lex scripta est, to follow and obey (People v. Merrill, 21 Wend. 584); that there is no safe rule for construing the extent or the limitation of powers in a Constitution other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

This principle was applied in Settle v. Van Evrea, 49 N. Y. 280, where the question arose as to whether or not Commissioners

of Appeals were subject to all the provisions affecting judges of the Court of Appeals and other courts, the commissioners having been appointed for the purpose of disposing of certain cases pending in the Court of Appeals on a day specified. It was held that they were not debarred from acting as referees, although judges of the Court of Appeals were so debarred, simply because the commissioners were not named in the clause of the Constitution which prohibited judges of the Court of Appeals from acting as referees. In the course of his opinion Judge Allen used language which it would be well to dwell upon in the present instance, since it meets the argument of which so much has been made, and indicates that the only safe rule of constitutional interpretation is to deal with the Constitution as it is written and to leave it to the people to correct any defects or to supply any omissions. He said:

> "If to meet exigencies and to prevent mischiefs it is allowable, sometimes, to depart from the strict letter of a law and imply an intent not already expressed in the construction of ordinary statutes, which may be framed in haste and with none of the formalities that attended the preparation of a state Constitution, it would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms merely because a restricted and more literal interpretation might be inconvenient and impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> "That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves. The terms of the instrument being clear and free from doubt and having a well understood meaning and application, the better way is to stand upon the maxim ita lex scripta est, and leave any supposed defect or omission to be remedied by the people or by legislation."

In People ex rel. Gilbert v. Wemple, 125 N. Y. 485, this principle was again applied. There article 6, section 13, of the Con-

stitution, relating to term of Court of Appeals judges and Supreme Court justices, was the subject of consideration. It read:

> "The official terms of the said justices and judges who shall be elected after the adoption of this article shall be fourteen years from and including the first day of January next after their election. But no person shall hold the office of justice or judge for any court longer than until and including the last day of December next after he shall be seventy years of age. The compensation of every judge of the Court of Appeals, and of every justice of the Supreme Court, whose term of office shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected."

The relator was elected a Supreme Court justice in November, 1865, for a term of eight years, commencing January 1, 1866. In November, 1873, he was reelected for a term ending December, 1887. But in 1882 he became seventy years old and accordingly his term ended on December 31, 1882, after he had served seventeen years as a Supreme Court justice.

The question presented was whether the ten years' service referred to in the Constitution was to be ten years of the term abridged. The Attorney General so contended.

Judge Peckham, however, said:

> "If the term expire by reason of the running of the full term of fourteen years before the judge or justice reaches the age of seventy and he thereupon goes out of office, the provision of the Constitution does not meet his case. His term has not been abridged, although he may have been twenty, thirty, or even more years on the bench, and he has already received compensation for the full term for which he was elected. This only proves that the constitutional provision fails to meet a deserving case. . . . That one fact is not enough to cause us to impart words into the Constitution which are not there, for the purpose of altering the meaning of that instrument as it actually reads. It seems to me that even greater care and caution should be used in adding or

striking out words from a provision in our organic law on the ground that it is necessary in order to obtain the true meaning of such provisions, than if such provisions were contained in a statute because the fundamental law of the State is presumed to be and indeed is prepared with the very greatest deliberation and adopted only after every opportunity has been had by different Legislatures and by the people at large. To construe the provision as the appellant claims it should be construed, is to add words which are not there now and which when then added alter materially the meaning of the provision."

In this connection it is well to ponder the oft-quoted words of Chief Justice Bronson in Oakley v. Aspinwall, 3 N. Y. 368, and which about a year ago I had occasion to quote in another argument before a part of this tribunal. They are, however, so timely and pertinent that they well merit repetition:

"It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument to supply its defects. If the Legislature or the courts may take that office upon themselves; or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the Government. Written constitutions will be worse than useless. Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power — some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not

work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary in enlarging the powers of the Government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the Government are just what those in authority please to call them."

It will also be asserted by the impeachment managers, that the proposition which I have discussed at such length is technical in its nature; that the accused should not be permitted to avoid a hearing upon the charges that have been made against him, that he should meet those charges by evidence, and not by resort to constitutional or legal objections — to technicalities.

This is not a novel position from the standpoint of history. It is as old as tyranny, as ancient as lawlessness. There are times when all laws — even the Decalogue — are regarded as technical. Those who controlled the machinery of the Star Chamber in the days of the Tudors; those who issued lettres de cachet in the reign of Louis XV; Robespierre and Marat, when during the Reign of Terror they plied the guillotine; the autocrat of all the Russias, when summarily consigning the flower of his people to the dungeon and to Siberian exile; the mobs which in our own land have resorted to lynching — all have been actuated by a common abhorrence of legal procedure according to established principles, and have viewed the restraints of the written law and of elemental justice as technicalities. And we have now in our day come to the pass when an appeal to the supreme law — the Constitution — which enshrines the self-imposed restraints of a free people, is likewise treated as a technicality, whenever it is believed that it may wrest from immolation the victim of partisan fury, or from confiscation the property of those against whom popular hatred has been aroused.

That would be a sad day in our judicial history when reliance upon the Constitution and the law of the land were to be regarded

as technical, or were to be contemned and deemed unworthy. So long as our people may proudly boast that this is a government of laws and not of men, so long will its liberties be preserved and its institutions perpetuated. But whenever the time shall come when the ignorance of the mob, its passions and its prejudices, or when considerations of mere political expediency, may prevail against the word of the organic law, when the time-honored concepts of "due process of law" and "the law of the land," shall be treated as mere jests, and become the objects of derision and obloquy, when the usurpation by one branch of the government of the powers which belong to another, may be regarded with equanimity, then the hour of disintegration will be at hand, and it will only require one endowed with the necessary audacity, "the man on horseback," to ride rough-shod over the ruins of the Constitution, and that system of government which has made of us a people happy, law-abiding and free, will give way to the hysterical caprices of tyranny and despotism.

We are confident that this tribunal will not shrink from the duty of applying the Constitution regardless of the outcries of those who, for ulterior reasons, are prepared to strike it down if it stands in the way of the accomplishment of their selfish purposes. It is one of the glories of our Court of Appeals, that it has hitherto fearlessly closed its ears to the discordant ravings of those who have from time to time demanded that it do violence to the Constitution and the law, in order that one whom they have prejudged to destruction might not escape their vengeance. It has never been terrorized or coerced by threats or cajoled by flattery or influenced by ridicule, or by the fear of unpopularity, into doing an act of positive injustice, and the sneer which regards the taking of shelter under the Constitution, as a technicality, has never led it to withdraw its protection from him who sought that citadel, or to weaken the steadfastness of its purpose in the enforcement of the law.

With all solemnity we express the confidence that this tribunal will not be swayed from a proper and due regard for the mandate of the Constitution, by the unworthy suggestion that to do so is to permit a technicality to triumph. To dismiss the articles of impeachment which have been presented to this tribunal for lack of

jurisdiction, would not be a triumph of technicality. It would be a vindication of that sacred instrument to which we all owe fealty, and upon the security of which, as the foundation of our political existence, depends the welfare of our beloved Commonwealth.

## APPENDIX A

(Accompanying Mr. Marshall's argument)

ALABAMA (1901).

Art. 4, sec. 76.— Legislative Department.

"When the Legislature shall be convened in special session there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, except by a vote of two-thirds of each house. Special sessions shall be limited to thirty days."

ARIZONA (1910).

Art. 4, subd. 2, sec. 3.

". . . The Governor may call a special session whenever in his judgment it is advisable. In calling such special session, the Governor shall specify the subjects to be considered at such session, and at such session no laws shall be enacted except such as relate to the subjects mentioned in such call."

ARKANSAS (1874).

Art. 6, sec. 19. Executive Departments.

"The Governor may by proclamation, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that shall have become since their last adjournment, dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened and no other business than that set forth therein shall be transacted until the same shall have been disposed of; after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

California (1879).

Art. 5, sec. 9.

"He (Governor) may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto."

Colorado.

Art. 4, sec. 9.

"The Governor may, on extraordinary occasions, convene the general assembly by proclamation, stating therein the purpose for which it is assembled; but at such special session no business shall be transacted other than that named in the proclamation; he may by proclamation convene the Senate in extraordinary session for the transaction of executive business."

Connecticut.

Art. 3, sec. 2.

"There shall be one stated session of the General Assembly, to be holden in each year, alternately at Hartford and New Haven, on the first Wednesday of May and at such other times as the General Assembly shall judge necessary; the first to be holden at Hartford; but the person administering the office of Governor, may on special emergencies convene the General Assembly at either of said places at any other time, and in case of danger from the prevalence of contagious diseases, in either of said places, or other circumstances, the person administering the office of Governor, may by proclamation convene said Assembly at any other place in their state."

Delaware (1897).

Art. 3, sec. 16.

"He (Governor) may on extraordinary occasions convene the General Assembly by proclamation; or in case of disagreement between the two houses, with respect to the time of adjournment, adjourn them to such time as he shall think

proper, not exceeding three months. He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."

FLORIDA (1885).

Art. 4, sec. 8.

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to be convened, and the Legislature when organized shall transact no legislative business other than that for which it is specially convened, or such other legislative business as the Governor may call to its attention while in session, except by a two-thirds vote of each house."

GEORGIA (1877).

Art. 5, sec. 1, par. 13.

". . . He (Governor) shall have power to convoke the General Assembly on extraordinary occasions, but no law shall be enacted at called sessions of the General Assembly except such as shall relate to the object stated in his proclamation convening them."

IDAHO (1889).

Art. 4, sec. 9.

"The Governor may on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the Senate in extraordinary session for the transaction of executive business."

ILLINOIS (1870).

Art. 5, sec. 8.

"The Governor may, on extraordinary occasions, convene the General Assembly, by proclamation, stating therein the purpose for which they are convened, and the General Assembly shall enter upon no business except that for which they are convened."

INDIANA (1851).

Art. 4, sec. 9.

" . . . But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time, by proclamation, call a special session."

IOWA (1857).

Art. 4, sec. 11.

"He (Governor) may, on extraordinary occasions, convene the General Assembly, by proclamation, and shall state to both houses when assembled, the purpose for which they shall have been convened."

KANSAS (1859).

Art. 1, sec. 5.

"He (Governor) may, on extraordinary occasions, convene the Legislature by proclamation, and shall at the commencement of every session, communicate in writing such information as he may possess, in reference to the condition of the state, and recommend such measures as he may deem expedient."

KENTUCKY (1890).

Sec. 80.

"He (Governor) may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place of (if) that should have become dangerous from an enemy or from contagious diseases. . . . When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no others shall be considered."

LOUISIANA (1898).

Art. 75.

"He (Governor) shall take care that the laws are faithfully executed, and he may on extraordinary occasions, convene the General Assembly at the seat of government, or, if that should have become dangerous from an enemy or from an epidemic, at a different place. The power to legislate shall be limited to the objects specially enumerated in the proclamation convening such extraordinary session; therein

the Governor shall also limit the time such session may continue; provided it shall not exceed thirty days. Any legislative action had after the time so limited, or as to objects not enumerated in said proclamation shall be null and void."

MARYLAND (1867).

Art. 2, sec. 16.

"The Governor shall convene the Legislature or the Senate alone, on extraordinary sessions; and whenever the presence of an enemy or from any other cause the seat of government shall become an unsafe place for the meeting of the Legislature, he may direct their sessions to be held at some other convenient place."

MAINE (1819).

Art. 5, sec. 13.

"He (Governor) may on extraordinary occasions convene the Legislature; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the day of the next annual meeting; and if since the last adjournment, the place where the Legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the state."

MASSACHUSETTS.

Chap. 2, sec. 1, art. 4.

"The Governor, with advice of counsel, shall have full power and authority during the session of the general court (Legislature) to adjourn or prorogue the same to any time the two houses shall desire, and to dissolve the same on the day next preceding the last Wednesday in May; and, in recess of the said court, to prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the commonwealth shall require the same; and in case of any infectious distemper prevailing in the place where the said court is next at any time to convene, or any other cause happening whereby danger may arise to the health or lives of the members from

their attendance, he may direct the session to be held at some other, the most convenient place within the state."

MICHIGAN (1850).

Art. 5, sec. 7.

"He (Governor) may convene the Legislature on extraordinary occasions."

MINNESOTA (1857).

Art. 5, sec. 4.

" . . . He (Governor) may on extraordinary occasions convene both houses of the Legislature."

MISSISSIPPI (1890).

Art. 5, sec. 121.

"The Governor shall have power to convene the Legislature in extraordinary session whenever in his judgment the public interest requires it. Should the Governor deem it necessary to convene the Legislature, he shall do so by public proclamation, in which he shall state the subject and matters to be considered by the Legislature when so convened, and the Legislature when so convened as aforesaid, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the Governor, nor, by which the session is called, except impeachments and examination into the accounts of state officers. The Legislature when so convened may also act on and consider such other matters as the Governor may in writing submit to them while in session. . . ."

MISSOURI (1865).

Art. 5, sec. 9.

"The Governor shall, from time to time, give to the General Assembly information relative to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary occasions he may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary.

MONTANA (1889).

Art. 7, sec. 2.

"He (Governor) may on extraordinary occasions convene the Legislature by proclamation, stating the purposes for which it is convened, but when so convened it shall have no power to legislate on any subject other than those specified in the proclamation or which may be recommended by the Governor, but may provide for the expenses of the sessions and matters incidental thereto."

NEBRASKA (1875).

Art. W, sec. 8.

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together."

As amended to 1910, art. 5, sec. 9.

NEVADA (1864).

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation and shall state to both houses when organized, the purpose for which they have been convened and the Legislature shall transact no legislative business except that for which they were especially convened, or such other legislative business as the Governor may bring to the attention of the Legislature while in session."

NEW HAMPSHIRE (1902).

Part second, art. 49.

"The Governor with advice of counsel, shall have full power and authority, in recess of the general court, to prorogue the same from time to time, not exceeding ninety days in any one recess of said court, and during the sessions of said court to adjourn or prorogue it to any time the two houses may desire; and to call it together sooner than the time to which it may be adjourned or prorogued; if the welfare of the state should require the same."

New Jersey (1897).

Art. W, sec. 6.

"  .  .  .  He (Governor) shall have power to convene the Legislature, or the Senate alone, whenever in his opinion public necessity requires it.  .  .  ."

New Mexico (1910).

Sec. 32. *Special Sessions.*

"Special sessions of the Legislature may be called by the Governor, but no business shall be transacted except such as relates to the business specified in the proclamation."

North Carolina.

Art. 3, sec. 9.

"The Governor shall have power on extraordinary occasions, by and with the advice of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened."

North Dakota.

Art. 3, sec. 75.

"  .  .  .  He (Governor) shall have power to convene the Legislative Assembly on extraordinary occasions.  .  .  ."

Art. 2, sec. 56.

"No regular session of the Legislative Assembly shall exceed sixty days except in the case of impeachment, but the first session of the Legislative Assembly may continue for a period of one hundred and twenty days."

Ohio (1910).

Art. 2, sec. 9.

"He (Governor) may on extraordinary occasions, convene the General Assembly by proclamation, and shall state to them, when assembled, the purposes for which they shall have been convened."

Oklahoma (1907).

Art. 6, sec. —.

"The Governor shall have power to convene the Legislature or the Senate only, on extraordinary occasions. At

extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration."

OREGON (1892).

Art. 5, sec. 12.

"He (Governor) may on extraordinary occasions convene the Legislative Assembly by proclamation, and shall state to both houses when assembled, the purpose for which they shall have been convened."

PENNSYLVANIA.

Art. 4, sec. 12.

"He (Governor) may on extraordinary occasions convene the General Assembly, and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."

Art. 3, sec. 25.

"When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session."

SOUTH DAKOTA (1889).

Art. 4, sec. 4.

". . . He (Governor) shall have power to convene the Legislature on extraordinary occasions. . . ." (No limitation on power).

RHODE ISLAND (1842).

Art. 7, sec. 7.

"He (Governor) may on extraordinary occasions, convene the General Assembly at any town or city in this state, at any time not provided by law. . . ." (No restriction on powers.)

SOUTH CAROLINA (1875).

Art. 4, sec. 16.

"He (Governor) may on extraordinary occasions convene the General Assembly in extra session. . . ." (No limitation on powers.)

TENNESSEE (1870).

"He (Governor) may, on extraordinary occasions, convene the General Assembly by proclamation in which he shall state specifically the purposes for which they are to convene, but they shall enter on no legislative business except that for which they were specifically called together."

TEXAS (1876).

Art. 4, sec. 8.

"The Governor may on extraordinary occasions, convene the Legislature at the seat of government, or at a different place in case that place should be in possession of the public enemy or in case of the prevalence of disease thereat. His proclamation should state specifically the purpose for which the Legislature is convened."

UTAH (1895).

Art. 7, sec. 6.

"On extraordinary occasions the Governor may convene the Legislature by proclamation, in which shall be stated the purpose for which the Legislature is to be convened, and it shall transact no legislative business except that for which it was especially convened, or such other legislative business as the Governor may call to its attention while in session."

VERMONT.

Chap. 2, sec. 11.

". . . and they (Governor and Lieutenant Governor) shall have power to call together the General Assembly when necessary, before the day to which they shall stand adjourned."

VIRGINIA (1902).

Art. 5, sec. 77.

" . . . and (Governor) the General Assembly on application of two-thirds of the members of both houses thereof or when, in his opinion, the interests of the state require it."

WASHINGTON (1899).

Art. 3, sec. 7.

"He (Governor) may on extraordinary occasions, convene the Legislature by proclamation in which shall be stated the purposes for which the Legislature is convened."

WEST VIRGINIA (1872).

Art. 7, sec. 7.

"The Governor may on extraordinary occasions, convene at his own instance, the Legislature; but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together."

WISCONSIN.

Art. 4, sec. 11 of Amendments 1881.

"The Legislature shall meet at the seat of government at such times as shall be provided by law once in two years and no oftener, unless convened by Governor in special session and whenever so convened, no business shall be transacted, except as shall be necessary to accomplish the special purposes for which it was convened."

WYOMING (1889).

Art. 4, sec. 4.

" . . . He (Governor) shall have power to convene the Legislature on extraordinary occasions. . . ."

## Reply to Argument for Impeachment Managers as to Jurisdiction.

Mr. Marshall.— May it please the Court: I shall make only a few discursive remarks in reply to some of the arguments presented by our opponents.

It is claimed that the Legislature has absolute power. Now, that certainly cannot be true. There are limitations and restrictions in the Constitution upon the power of the Legislature. The legislative power is vested in the Senate and Assembly, but that power can be exercised only when the Legislature, the two houses, come together, and subject to the numerous limitations and conditions which are contained in the Constitution. It can legislate at an extraordinary session only when the Governor recommends legislation on designated subjects, and then only on the subjects designated. So that the contention of our friends is too broad and loses sight entirely of the express terms of the Constitution.

It is further argued that the Constitution provides that the Assembly shall have the power of impeachment, and that is asserted to be a broad plenary power. The difficulty with this argument is that it overlooks the fact that the clause quoted is one clause out of many which relate to the subject, and we must read together all the pertinent clauses.

The Assembly has the power of impeachment, but the Assembly has that power only provided it complies with the other provisions of the Constitution. The Constitution should be read as though in one clause it provided that the Assembly has the power at any regular session to impeach, but that at extraordinary sessions the subject of impeachment shall not be acted upon except when it is called to the attention of the Assembly by the Governor with a recommendation by him that action be taken.

Very frankly Senator Brackett says, and I honor him for his frankness, that logically his position is, that the Assembly, having the power to impeach, can convene itself for the purpose of exercising that power. If the Assembly has the power of convening itself, then that Pandora box of evils, which I have tried to describe in my main argument, is opened. For, in

such a case where is the limit to be fixed? What will be the consequence of a recognition of the proposition that a self-convened Assembly may perform so tremendous an act as that of impeachment, without regulation of any kind, without notice, without regard as to how the assemblymen are to be brought together, or who is to bring them together? All such action would be in contravention of the history of parliamentary bodies and their uniform practice since parliamentary bodies began.

I again call attention to the provision of the Alabama Constitution which sought to deal with this very subject and which made adequate provision for just such a contingency as that which has now arisen. The absence of a similar provision in our Constitution is the strongest possible argument in favor of our contention.

Judge Parker says that when there is a grant of power there go with it all the lesser powers to make the greater power effectual, and he argues therefrom that the power of impeachment having been conferred, may be exercised at any time and in any place by the Assembly. The difficulty with the argument is that it overlooks the qualification which has been imposed upon its underlying proposition almost since its first formulation of as a principle, namely, that if a power is granted and a specific method is provided for the exercise of that power, or limitations are placed upon its exercise, those limitations and methods of exercising it are exclusive and the implication of any powers different from those expressed, is not warranted because the expressed powers necessarily must control. There can be no implication as against an express provision.

Judge Parker also gave a long illustration to prove how important it is that this power of impeachment shall be exercisable at all times, at any hour. He showed that $50,000,000 had been devoted by the State to the highway fund, and he asserted that it would be possible for contractors in conjunction with public officials to loot the State and rob it of that fund; and that therefore the right of the Assembly to impeach at a self-convened session should exist, in order to prevent such a catastrophe. Has the possibility occurred to my friend that the power of impeachment might be exercised by a self-convened Assembly for the

very purpose of enabling these looters, fraudulent contractors and dishonest officials to carry out their unlawful purposes by impeaching an honest Governor who stands as an obstacle in their path, in order that they may without hindrance plunge their hands deep into the public treasury? It has been charged that there has been an impeachment of that kind in this State, for the very purpose of aiding the consummation of such a purpose.

It is said, suppose the Governor is guilty of treason between two legislative sessions, what can be done then? The answer is a very simple one. If he should lead the militia of this State against Massachusetts, as has been suggested; if he should try to seize the Supreme Court of the State — those would be treasonable acts — all that any citizen would have to do would be to go to the district attorney of Albany county, and call his attention to section 2380 of the Penal Law, and the offending Governor would be at once placed where he belongs. He would be indicted, prosecuted, and proceeded against under the Penal Law of the State.

Mr. Brackett.—May I have permission to ask a single question?

The President.— You will have to ask that privilege of your opponent.

Mr. Brackett.—With the consent of counsel.

Mr. Marshall.—I will permit any question counsel desires.

Mr. Brackett.—Suppose he pleaded guilty to a charge and then pardoned himself. What happens?

Mr. Marshall.—He could not pardon himself.

Mr. Brackett.—Why not?

Mr. Marshall.—Having pleaded guilty to the charge, he would thereupon stand convicted, and conviction, ipso facto, removes him from office. Besides, if the counsel is familiar with the Constitution, he would know — I have read it to him this afternoon, but perhaps he did not listen to my argument — that there cannot be a pardon for treason.

Mr. Brackett.—A lesser crime than treason.

Mr. Marshall.—You are answered, aren't you?

Mr. Brackett.—No.

Mr. Marshall.—Nor could he pardon himself for any crime, as I have already shown by reference to the constitutional provisions defining the pardoning power.

Opposing counsel further say that this constitutional provision declaring that no subject may be acted upon except such as is recommended by the Governor, refers to legislative acts. I would like to know where my friends get that idea. When the Constitution declares that no subject shall be acted upon, that, according to my understanding, includes legislative, judicial, executive acts, acts of every character. If my friends were correct, how in the world would they phrase such a provision if they desired to exclude from it all acts including other than legislative acts? How could the Constitution have been framed to have excluded impeachment if it was necessary to do that in order to make it one of the subjects which could not be acted upon? Apparently they say that it must be shown affirmatively what subjects shall not be acted upon. According to their contention, our Constitution would soon grow into the dimensions of a Throop code. It would be converted into a catalog of the various subjects which are or are not to be considered at an extraordinary session. It would then read: "At an extraordinary session no subject shall be acted upon, including matters of legislation, appointments, elections, impeachments, and judicial action of every kind." I am confident that my friends would not thus phrase the Constitution. I do not believe that if they were members of a constitutional convention, they would do otherwise than to use the very words now contained in our Constitution, namely, "no subject shall be acted upon," since they include all the subjects to which we have referred.

But, they ask, what is the reason for this provision as I have construed it? The reason is very clear, as the authorities show. An impeachment is a lengthy proceeding. The preliminaries should be carefully considered. Thought takes time. The purpose of the Constitution makers was that the State should not be distracted by having special sessions of long duration, which would involve great expense to the State, and would

be apt to arouse bitterness and conflict among our citizens. Therefore, it was very wisely considered that it is only under the most exceptional circumstances that an extraordinary session should be called, and the sole judge as to the desirability or propriety of such a session is the Governor. That power rests in him alone. But my friends say that that power also rests in the Assembly because in a case of impeachment its members may call themselves together at any time. There is no warrant in the Constitution for such a contention. They say the Legislature is to be called together. That means both houses. But what about the Senate being called alone? What subjects can it act upon? It certainly cannot deal with legislative subjects. It necessarily is confined to dealing with matters of appointment, if it is called alone in extraordinary session. That is a perfect demonstration of the fact that the provision of the Constitution that we are now dealing with is not limited to legislative subjects, but is a broad limitation of power which deals not only with matters of legislation but with all subjects which can come before the Legislature or either of its houses. In dealing with this subject, I desire to add to my argument this statement:

The established rule of construction, that where the means by which a power granted shall be exercised are specified, no other or different means for the exercise of such power can be applied, even though considered more convenient or effective, than the means given, if given effect, necessarily confines the sessions of Senate and Assembly to the times enumerated in the Constitution.

It may be argued, however, that the Assembly and the Senate when proceeding upon an impeachment before trial do not act as the Legislature for the reason that a legislative function is not being performed.

Assuming that an impeachment is a judicial and not a legislative act, the contention that the Assembly and Senate are not the Legislature when proceeding upon an impeachment is equivalent to saying that when the Senate and Assembly are exercising a judicial function, or a function not legislative, they are no longer to be called "The Legislature," but are then converted into bodies of a new and distinct character. In other words this involves the assertion of the incongruity that at times the Senate and Assembly are not "the Legislature."

This confusion of terms has arisen because the name which the framers of the Constitution applied to the two houses is descriptive of one class of functions exercised by them. The term "Legislature" is a convenient and arbitrary name applied to the Senate and Assembly, the same as the name "Parliament" is applied to the king, the House of Lords and the House of Commons, or the name "Congress" to the Senate and House of Representatives.

The Senate and Assembly, at all times, are the Legislature of the State of New York and each house is a part of the Legislature of the State without regard to the functions performed. So that in this case the very learned argument of Judge Parker would fall to the ground if it happened that in our Constitution the Legislature were termed the Congress or were called Parliament or were given some other name than the Legislature. This word "Legislature" is merely an arbitrary name given to the two houses and is not intended to confound the meaning of this provision in section 4 of article 4 of the Constitution which deals with the powers which may be exercised at an extraordinary session.

Our opponents also say that if our contention is correct, the Assembly could not at an extraordinary session elect a new speaker or a new clerk if those chosen at the regular session should die, nor appoint new committees. That of course is not a fair statement of our position. We have never made any such claim and never would indulge in such a contention. When the Legislature is in session the Assembly has the right to elect its own officers, whether it be convened in extraordinary session or at a regular session. The several houses must have officers. The provision of the Constitution does not deal with the mere internal government of these houses or with regard to the manner in which they shall respectively proceed. Nobody would claim that. Therefore all the learning which my friends have lavished to establish what we have not denied is entirely unnecessary because we concede their proposition.

They say the Assembly may come together at any time and impeach, and that all it has to do is to present the articles of impeachment to the President of the Senate. I do not read the Con-

stitution the way my friends read it when they say that the articles can be delivered to the President at any time. The President of the Senate is such when the Senate is in session and then only. Those words are not used as descriptio personae, as referring to the particular individual who happens to hold that office at a given time; my friend certainly would not so contend. Of course articles of impeachment could not be presented to the President of the Senate on 14th street in the city of New York or at the Throne Room at Delmonico's in that city and thereby constitute an impeachment.

Mr. Brackett.— Or at the Republican Club, either.

The President.— Gentlemen, I do not find a direct provision in the Constitution —

Mr. Brackett.—It is in the Code.

The President.—There is no provision that I find in the Constitution.

Mr. Marshall.—I agree with you.

The President.—There is no use in discussing the question when there is no such provision in the Constitution.

Mr. Marshall.—It means that they must be presented to the Senate. That is the contention which I make. They cannot be presented to an individual. Section 13 of article 6 uses the phrase "after articles of impeachment . . . shall have been preferred to the Senate."

The counsel has also said that we cannot attack the manner in which this impeachment was voted; that we cannot go into the question whether notice was given to the members of the Assembly of the meeting. Why, his answer is, the journal shows that a vote of a majority of the Assembly was given in favor of this impeachment, and the journal is conclusive and we cannot go back of the journal. Does my friend mean to say that the journal of the Assembly is one thing when it relates to legislative matters and another thing when it relates to matters of impeachment? Does he mean to argue that this is not an Assembly

and it does not act in a legislative capacity when it impeaches and yet the journal which is the journal of a legislative body, is conclusive upon this so-called judicial act? I think he is getting confused in his conceptions as to the nature of this body. My contention is that this is the body called the Assembly, a part of the Legislature, that possibly journals may be conclusive in regard to those matters, possibly they may not; certainly if it is merely a judicial act, speaking again technically, since he uses the phrase in its technical sense, our contention then is that we are entitled to prove that no notice was given.

But if his contention is correct, that the journal is conclusive, then he must recognize this as being a legislative act under all circumstances and under all conditions.

He has also cited the opinion of Judge Rapallo in People v. Keeler, 99 New York 463. I do not read the opinion as constituting a declaration on the part of that great jurist that the exercise of the power of impeachment is a judicial act. I scarcely think that even Senator Brackett himself wishes to have it considered that he himself believes it to be a judicial act. I say advisely, however, after a thorough investigation of this subject, that if the words quoted were intended as a statement that impeachment is a judicial act, the remark which after all was merely obiter, is incorrect. For once Jove nodded. But I repeat what I have already said several times, it makes no difference for present purposes whether impeachment be regarded as a judicial act, an executive act or a legislative act. It is in any event "action" on a "subject" and therefore comes within the purview of the clause of the Constitution relating to extraordinary sessions.

Senator Murtaugh.—Mr. President, may I ask the counsel a question?

The President.—Yes, certainly. Return here, if you please, Mr. Marshall.

Senator Murtaugh.—You contend that the Governor could be indicted for a crime only during the months when the Legislature is in session. Would not that destroy the theory upon which the Court of Impeachment is created, namely, that high State officials

should be tried by officers of similar rank, that the average jury would be impressed by the fact that they were trying a Governor? Did not the Constitution create the Court of Impeachment for that very purpose?

Mr. Marshall.—My answer to that, Senator, is that so far as our penal law is concerned, it is no respector of persons. Any member of the State government who violates the penal law is subject to indictment and the provision of the Constitution which relates to impeachment expressly provides that the fact of impeachment need not in any way prevent a subsequent indictment or the trial of an indictment for an offence which is made the subject of an impeachment. So it seems to me that the question that you have asked does not meet the situation, because our contention is that there is no harm that can come in such a case as you have instanced, there being a remedy, an effective remedy and one which protects the State against any possible havoc or inconvenience. However, even if there were no remedy in that regard, the mere matter of inconvenience is not of great importance, because of the provision of the Constitution which indicates that an impeachment can take place only in the manner and subject to the conditions and limitations fixed and described in the Constitution.

Senator McClelland.—Mr. President, may I have the privilege of asking my friend a question?

The President.—Senator McClelland, certainly.

Senator McClelland.—You spoke of the Code in answer to Senator Brackett's suggestion with reference to Judge Parker's suggestion with reference to a Governor who should be guilty of treasonable conduct during a recess of the Legislature or when the session had terminated, and that the district attorney could be applied to for the purpose of proceeding against the Governor, and thus meeting the necessities of an action of that kind. Did you contemplate in that view the fact that under the Constitution the Governor has the right to suspend the district attorney?

Mr. Marshall.—I did; I have also contemplated the fact that where the district attorney has been suspended, there is the at-

torney-general, who has all the powers of the district attorney and who may appear before a grand jury and direct its action. There is thus another officer who should be considered. There is just one remark that I wish to add: It was argued and decided the other day in connection with the determination of the challenges which had been interposed to certain members of this Court, that there was no right to challenge any officer except the Lieutenant Governor in case of the impeachment of the Governor or of the Lieutenant Governor, the only provision contained in the Constitution, which permitted the exclusion of any officer who otherwise would be a member of this High Court of Impeachment, referring to two specified contingencies only. It would seem to follow from that ruling that the express limitation of the power to challenge or to exclude from participation in the decision of the Court affects one individual only, and is therefore, exclusive, that the provision of our Constitution with regard to what may be done at extraordinary sessions, which is subject to no exception whatsoever, which is general in its language, which is all-embracing in its scope, ought to be given the same exclusive effect, upon the very principle on which the first decision rendered by this tribunal was based.

## Admissibility of Testimony Concerning Contributions Not Specified in the Articles of Impeachment.

Mr. Marshall.—My objection is that under the articles of impeachment, which govern us here just as an indictment would govern us if this were a criminal action, there is absolutely no allegation which presents as ground for complaint the fact that a contribution was made by this witness or by any organization which he may represent, which was not included in the report or statement filed in the Secretary of State's office, or which was not accounted for, or which was appropriated by the defendant or respondent to his own use; and that therefore any evidence with regard to it is immaterial and incompetent.

The first article alleges that the respondent, having been elected, being required by the statute to make a certain statement setting forth his receipts and expenditures in connection with his candidacy, filed a statement and indicated that he had received certain sums of money from 68 contributors and had expended certain sums of money for expenses; and that the said statement thus made and filed by said William Sulzer as aforesaid was false and was intended by him to be false and an evasion and violation of the statutes of the State, and the same was made and filed by him wilfully, knowingly and corruptly, it being false in the following particulars among others, to wit: It did not contain the contributions that had been received by him and which should have been set forth in said statement, to wit, naming these:

Jacob Schiff, Abram I. Elkus, William F. McCoombs, Henry Morgenthau, Theodore W. Meyers, John Lynn, Lyman A. Spaulding, Edward F. O'Dwyer, Frank V. Strauss Company, John W. Cox, John T. Dooling, and not including this witness nor any organization which he represented.

That in making and filing such false statement as afore-said the said William Sulzer did not act as required by law but did act in express violation of the statutes of the State and wrongfully, wilfully and corruptly and so forth.

The second article charges that he made an affidavit in which he

wilfully, knowingly and corruptly made a false statement, which was claimed to constitute a perjured statement in that it did not contain the names as contributors of the same individuals whom I have mentioned, that the statement was wilfully, knowingly and corruptly false in the following particulars, to wit, that it did not contain an account of the contributions that had been received by him and which should have been set forth in said statement, to wit, those of the individuals I have just named.

The sixth article is the one that relates to the charge of larceny and states that he stole the moneys and checks of Jacob A. Schiff, Abram I. Elkus, William F. McCoombs, Henry Morgenthau, John Lynn, Theodore W. Meyers, Lyman A. Spalding, Edward F. O'Dwyer, John W. Cox, the Frank V. Strauss Company and John T. Dooling and cash aggregating $32,850.

Of course, the purpose of these articles of impeachment, as it is also the purpose of an indictment, is to give notice to the person charged with the commission of an offense, of the nature and character of the charges made against him so that he may have an opportunity to investigate the accusation, to prepare for his defense and to present such explanatory matter as is required or deemed desirable.

It is contemplated by the provisions of the Code of Criminal Procedure relating to the trial of impeachments that there shall be an interval of time not less than twenty days from the time of the filing of the articles and the giving of such notice, as to the character of the charges made so, presumptively, and the trial to enable the person charged with an impeachable offense to prepare himself to meet the allegations of wrongdoing and to defend himself against them.

We are now in the unenviable position of having presented to us for the first time upon this hearing, more than thirty days after the filing of the articles, without any additional articles of impeachment having been presented by the Assembly, a charge which we have not been heretofore notified to defend against. Upon the theory of our opponents they might practically change the entire nature of the case. They might remain entirely silent with regard to the individual transactions which are set forth in the articles of impeachment and come here for the first time upon

this hearing and present to us for consideration the names of individuals who were not suggested or specified in the articles. A trial under such circumstances would be a misnomer. The articles of impeachment would be deceptive and misleading in the same way that an indictment would be misleading if it charged that the defendant had committed larceny in stealing the goods of John Smith, and when the trial came on, attempt were made to show that the goods stolen were the property of Richard Roe, or John Robinson.

The purpose and intention of the framers of the Constitution and also of those who framed the Code of Criminal Procedure was to provide articles of impeachment which would be specific and which would give notice of the charges which the respondent is called upon to meet. Not only is that so, but it is for the purpose of indicating to the respondent what charges were considered by the Assembly as the charges which he was to be called upon to meet; non constat, a majority of the Assembly might have determined that matters relating to Mr. Tekulsky or Mr. Smith or Mr. Robinson were not proper to be considered by the Senate upon the trial and that the only charges which were to be considered were those which related to Mr. Schiff and Mr. Morgenthau and other specified individuals.

In other words, this is merely an attempt to recast the articles of impeachment, to recast an indictment upon the very trial and to enable this tribunal, which is only a Court, to assume the functions of a grand jury or of an accusing body.

It has been held in the cases to which I called the attention of the Court on a previous occasion, that the articles of impeachment and an indictment are for all practical purposes the same; that there can be no more an amendment of the articles of impeachment upon the trial than there can be an amendment of an indictment upon the trial. It is only the Assembly that can change the charges or amend them. The Senate cannot do it. The Court of Impeachment cannot do it, and certainly, by attempting on such an occasion as this, to accomplish the same result by the interrogation of a witness with respect to transactions not pleaded, without even the amendment of the articles of impeachment, is not permissible. It cannot be reasonably expected of the de-

fendant that he be prepared to meet charges which are not included within the articles of impeachment; which have not been acted upon by the Assembly; which have not been made the subject of an amendment; and thus enable the prosecution by indirection to accomplish the very thing which the courts have held cannot be done directly.

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Mr. Marshall.— May it please the Court: This is purely and solely a question of pleading and proof under the pleading. When the proper time comes to sum up this case, we will be prepared to do that. I shall try to discuss this question as a question of law and not introduce into it extraneous matter, which is not proper to be considered before a judicial tribunal. Counsel has said that in the terms of this article 1 it is stated that the report was wilfully, knowingly and corruptly made, it being false in the following particulars among others, to wit, etc. The words "among others" do not meet the defect in pleading which we are here considering, because its allegations are specific. It charges that the statement did not mention contributions that had been received by him, and which should have been set forth in said instrument, to wit, naming the persons and the amounts of the contributions which the statement failed to enumerate. If there were other omissions, they must be set forth in the indictment, in the articles: it cannot be left to the district attorney or to the impeachment managers to say that there may be something besides that which they have specified which might be a ground for charging falsity. Indictments cannot be carried in the hat of a district attorney nor in the minds of impeachment managers. Charges must be set forth fully, completely. Counsel says we might have asked for a bill of particulars. It was not for us to ask for a bill of particulars. They are bound in their articles to furnish us with the statement of facts constituting the wrongful act, the crime, the impeachable offense. You might as well say in any case where there is a defective indictment, that the person charged with the commission of crime could eke out the insufficiency of the indictment by asking for a

bill of particulars or by going back and asking that the case be sent back to the grand jury, or in this case to the Assembly, for the purpose of having a proper indictment framed or proper articles of impeachment framed. They have furnished us their bill of particulars in these articles of impeachment. It was their duty to show us what the facts are on which they base the claim that we have committed a crime or a wrongful act, or an impeachable offense. The charge which we are called upon to meet is the charge of the Assembly, acting by a majority of all the elected members of the Assembly, and not otherwise, and it would be contrary to the spirit of the law and of the Constitution if the board of managers or counsel to the board of managers, might be considered as the substitutes or the delegates of the constitutional body which alone can find charges or present articles of impeachment. Counsel has said that it is elementary that one may prove other acts, other crimes, for the purpose of showing intent. It is true that there are certain exceptions to the general rule that one can only be called upon to meet those particular offenses which are charged in the indictment. The law upon that subject has been stated with wonderful clearness and comprehensiveness in the monumental opinion of Judge Werner in People v. Molineux, in the 168 N. Y. Reports, indicating that the rule is, the primary principle is, that a man charged with crime can only be called upon to meet that particular charge which is set forth in the indictment, and that he is not called upon to meet any other charge, and that evidence tending to show the commission of any other crime, even though it be a similar crime, is incompetent. Will my friend claim for a moment that upon an indictment for larceny committed by A for taking the property of B, that you can show that A has committed twenty other larcenies, even though they may be contemporaneous larcenies, or that A has committed twenty other burglaries or twenty other murders? Why, in the Molineux case it was proven for the purpose of indicating that it was Molineux who committed the crime which was charged against him, that he committed other similar offenses, for the avowed purpose of establishing that the several crimes were committed by one and the same person. Yet the Court of Appeals held that that proof was not competent, because

it violated the fundamental rule of justice and fairness which underlies our whole system of criminal law. There are, however, it is said, some exceptions. Undoubtedly there are. But this is not one of them. Counsel has cited People v. Dolan in 168 N. Y. But that was a case of forgery and the whole principle of that case, and its whole ratio decidendi was summed up in a few words which are contained in the opinion of Judge Werner on page 9 of the opinion, where he says that "a man might think," quoting from Judge Peckham in People v. Sharp (107 N. Y. 467), "the money he passed was good, and he might be mistaken once or even twice, but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit, the latter observation very tersely states a rule that is as applicable to prosecutions for forgery as to cases for passing counterfeit money."

That was all that was decided in the case of People v. Dolan. Other cases are referred to in the opinion of Judge Werner in the Molineux case to the effect that where there is an indictment for obtaining goods on false pretences that it is competent to show that contemporaneously goods were obtained on similar pretences from other people for the purpose of indicating the intent, the general purpose of the accused.

In support of our contention, I cite People v. McLaughlin, 150 N. Y., which was an indictment against a police inspector for extortion. The indictment charged extortion from some particular individual, A, B or C. On the trial, evidence was allowed to show that he had also committed extortion by taking money under like circumstances from C, D or E, through his ward men; and the Court of Appeals finally held, when the question came before it, that that evidence was incompetent and should not have been received and reversed a conviction on the ground that the trial court had committed error in admitting the evidence. Now, how does this case differ from that in any respect? Here is a charge that there had been committed a wrongful act, a failure to make a proper report, and that the report made was wrongful in these particulars; and then there is another charge, that of perjury, in that perjury was committed in respect to these particulars, and there is the charge of the

commission of the crime of larceny and that the larceny consisted in stealing the property of the particular individuals named. And yet, the prosecution is trying now to show that instead of there having been committed the larcenies which are set forth in article 6, that there were five, six, seven or eight, I don't know how many other larcencies committed from other individuals who are not mentioned or specified in the articles of impeachment; that there was not only committed perjury in the respect indicated in this charge, setting forth the perjury, but there were other perjuries in respect to other persons or other things, and so far as the false report is concerned, that it was false not only in the particulars specified but in other particulars. We are, therefore, transforming this case from that which we were invited to try; we are transforming the charge from that which the Assembly made into one which my friends are now seeking to make and to have now tried under these extraordinary circumstances. I might here say parenthetically that so far as the allegation is concerned, that the report filed was false in specified particulars, "among others," that statement is to be found solely in the article relating to the filing of a false report; it is not to be found in the charge with regard to perjury; it is not to be found in the charge with regard to larceny; it is confined merely to that first article.

But independent of that, taking this case in its broad aspect, in the interest of fairness and justice, I assert that it would be a violation of our rights if we were now called upon to go into testimony with regard to any matters except those which we were invited to try by the articles of impeachment which have been here presented.

Senator McClelland.—I would like to ask a question of information.

Mr. Marshall.— Certainly.

The President.— Senator McClelland.

Senator McClelland.—Are you sure that the McLaughlin case was not decided upon the ground that no crime, upon the evidence, had been proved against the defendant-appellant, and that he was

absolutely discharged under the decision of the Court of Appeals and no trial subsequently had?

Mr. Marshall.— Senator, I think not. The question which I am now considering was discussed in the opinion of the Court. I know the reversal was based upon the ground of the incompetency of testimony. Mr. Fox — one of my associates — was one of the counsel for the prosecution and can, if desired, give his personal recollection of the matter. I could send for the report, but I am very sure that one of the propositions decided was that to which I am now referring, and it was also, as I recollect it, reviewed together with all the authorities bearing upon the subject, in the opinion of Judge Werner in the Molineux case, to which I have adverted.

## Argument on the Admissibility of Testimony Showing the Intent of the Donors of Contributions.

Mr. Marshall.— May it please the Court: The testimony that was brought out on direct examination was in substance that Mr. Schiff had given a check. The check was produced. On that check appeared written certain words which Mr. Schiff put upon the check, not in October, 1912, but in June or July, 1913, stating in substance that it represented a campaign contribution.

The testimony therefore that was presented on cross-examination was entirely legitimate as bearing upon that fact, if for nothing else. But it was competent beyond that on the general issue, on the general proposition which we are considering.

The charge contained in the articles is that certain sums of money were received by the respondent from various individuals, including Mr. Jacob H. Schiff; that that money was received in a fiduciary capacity; that it was received for a special purpose; that there was a breach of trust, and that there was larceny of that money as a result of the manner in which the respondent dealt with it after it came into his possession.

The case, therefore, is to be considered precisely the same as though we were here trying an indictment against the respondent on the charge that he had received from Jacob H. Schiff $2,500, and had, with larcenous intent and with intent to commit a breach of trust, diverted that money from the purpose for which it was given and was intended to be given, and had thereby committed either the crime of larceny or a breach of trust, as a bailee or otherwise.

Therefore, in determining that question, we must consider the quo animo of two individuals; that of the respondent, for the purpose of ascertaining whether or not he dealt with that fund animo furandi, with intent wrongfully to take it and appropriate it to his own use — with criminal intent; and secondly, the purpose and state of mind of the person who is claimed to have been the victim of that crime, the person whose title to the fund was

taken, who was the person whose property it is asserted had been wrongfully and with larcenous intent taken from him.

Now, if the charge is made that A has stolen my watch or that A has received my watch as a bailee and has then wrongfully appropriated it to his own use, it certainly would be competent to ask me if I were a witness in the proceeding, for the purpose of establishing the charge, whether or not I intended that A might have the watch, or whether or not I intended that he could do with that watch what he pleased, use it for any purpose that he desired; sell it, give it away, or deal with it according to his own wish. It is undoubtedly true that I cannot be wrongfully made the victim of a crime against my right of property when I consent and am entirely willing that the particular act upon which the charge of criminality is sought to be predicated shall be done, when I have no objection to it. And, therefore, when Mr. Schiff was here as a witness, and the prosecution attempted to show by him that he had given this fund for a special purpose, it was entirely legitimate to ascertain whether or not he had so ear-marked this fund as to put it absolutely beyond the control of the defendant, and whether he was or was not satisfied and willing that that fund should be used for election purposes, for campaign purposes, or for any other lawful purpose or object for which the person to whom the money was given wished to use it.

## Closing Address for Respondent.

Mr. Marshall.— May it please the Court: We have now reached the stage in these momentous proceedings when it becomes necessary to review the allegations and the proofs which have been submitted to this tribunal, with a view to determining the guilt or the innocence of the respondent. The responsible duty of presenting the outline of the contentions on behalf of the Governor has been assigned to me. Though never shirking any responsibility that it may become my lot to assume, I nevertheless approach the performance of the present duty, not with false modesty, but with extreme diffidence, and with a full realization of the disparity of my powers and the greatness of the task which has devolved upon me.

We are on the threshold of an event which will make a permanent impression upon the history of our beloved State, which will entail consequences far beyond our ken, which will determine whether or not the reign of law has ceased, and that of passion and prejudice has begun. While the duty which rests upon counsel cannot be too greatly emphasized, that which rests upon this Court is infinitely greater, for while it is given to counsel but to present arguments, it is for the Court to decide, to adjudge, to create a precedent which will inevitably and irrevocably declare the policy of this State with regard to the permanency of its institutions and the independence of those who make up the sum total of its official life.

The picture which is now unfolded before the vision of the civilized world is almost unique in the experience of mankind. The Governor of the greatest state in the Union, with a population of ten million of free men, who was elected less than one year ago by an unprecedented plurality, is upon trial, before a Court which is composed of the judges of the Court of Appeals and of the senators, on an impeachment which charges him with the commission of various acts, which, it is asserted, entitle the complainants to a judgment of forfeiture of that office, and which will place an everlasting stigma upon his name, and upon the honored office to which he was thus triumphantly chosen by the suffrages of his fellow citizens, amid loud acclaim.

Who is this respondent, who has thus been placed, as it were, in the prisoner's dock, against whom there is asked to be pronounced the everlasting doom of infamy and shame, who is sought to be driven out of the office to which he was exalted but a few short months ago, and to be forever deprived of the right to hold public office and to serve the State? It is William Sulzer, who has just passed his fiftieth birthday, which was celebrated by those who stood highest in the civic and political life of the State, with congratulations and rejoicing, an occasion when even some of those who are now serving as impeachment managers, indulged in loud sounding praises of him, and were among the foremost to do him honor.

For more than twenty-five years he has been a prominent figure in the political activities of the State and of the nation. For five years he served in the Legislature of the State. During one year of that period, when barely thirty years of age, he was the speaker of the Assembly. For eighteen years he served in the national Congress, honored and respected, a power for good, chosen to serve on important committees, where all of his energies were directed to the betterment of human conditions and the improvement of the public service. It was given to him to serve in the last Congress as the chairman of the important Committee on Foreign Affairs, and it is a matter of public history that in that exalted station, he stood in the forefront of those who protected the sanctity and integrity of American citizenship, by bringing about the practically unanimous termination of the treaty between the United States and Russia, solely because of the unjust discrimination which was practiced as against American citizens. It was due to his energetic initiative, that the Chinese Republic was recognized by our Government, and that the assertion of human rights in many a land was stimulated and encouraged. He was largely instrumental in keeping open the doors of opportunity to the immigrants from foreign shores. He introduced and brought about the passage of the law which added new dignity to labor by the creation of the Department of Labor, and its representation in the presidential cabinet. He was a pioneer in that new field of legislation which has for its purpose the conservation of our natural resources.

He was nominated for Governor in an open convention. During his campaign he visited every corner of the State, and met the constituency which elected him, face to face. Upon his election,

he mapped out a broad policy of reform, intended to carry out the platform of his own political party, and the pronounced wishes of the electorate. He found the finances of the State in a scandalous condition. At his instance, a committee of investigators was appointed to examine into the various State departments, and to suggest improvements. As a result of this action, the Highway Department was entirely reorganized, the Department of Efficiency and Economy was created, the State Architect, under whose administration abuses had arisen, was removed; the Health Department, the Labor Department, the Prison Department, were all subjected to a complete revision, and a movement was set on foot for the reorganization of the Banking Department as well. The eyes of the people were opened, as never before, to abuses and evils which cried to heaven for correction and redress.

And now William Sulzer, who wrought all this, stands before you today, on trial for his very existence, charged with being a common criminal, and for what? Not because while an incumbent of office he has been guilty of official corruption; not because he has taken one dollar of the people's money, or has enriched himself at their expense, or has received a bribe, or has done aught to injure the public weal; not because he has been guilty of treason, of a violation of the Constitution, or of his oath of office; not because he has neglected the performance of his official duties, or has absented himself from the seat of government, or indicated, to the slightest degree, a lack of zeal for the public welfare. It is not charged that he was incompetent or ignorant, or incapable of performing the duties of his office, or that he has not been duly watchful of the interests which he has sworn to guard. It is not charged that he has entered into a conspiracy with those who would loot the public treasury, or who would batten on contracts improvidently or corruptly drawn without safeguards to forestall adequately the possibility of fraud and collusion. The achievements of his administration, as they have passed before the eyes of the people, absolve him from all suspicion of guilt in regard to any of the offences contained in the usual category of official misconduct.

And yet the impeachment managers are now seeking to remove William Sulzer from the office which he has thus honorably filled, fifteen months before the expiration of the term for which he was elected. If Macaulay's celebrated New Zealander, or Montesquieu's famous Persian were now among us, he well might ask,

why, in this land of boasted liberty and freedom, one deserving so well at the hands of his fellowmen should be subjected to this awful degradation, and why the State which he has served so well should be involved in his ruin and disgrace. The only answer which could be vouchsafed to them is to be found in the articles of impeachment, which, as the record shows, were adopted at dawn of the fatal 13th day of August, 1913, by the Assembly of the State of New York, in less than thirty-six hours after the presentation of the report of an investigating committee which the members of the Assembly could not possibly have read or considered when they voted the adoption of these articles.

The case against Governor Sulzer must stand or fall on these charges. Nothing can be added to them. It is beyond the power of the impeachment managers as it is of this Court to permit them to be amended or enlarged or altered. If they are insufficient in law or in fact then the respondent must be acquitted. It matters not what the individual impressions of any member of this Court may be with regard to him as a man or as a citizen; it matters not whether his actions as disclosed by the record before us were always characterized by good taste or good judgment, or whether they conformed to the highest standard of ethics or of etiquette — all that goes for naught.

The only proposition which this Court has a right to consider is the respondent's guilt or innocence of the charges set forth in the articles of impeachment which were served upon him — that and that only.

These charges are eight in number. Six of them practically cluster around a report filed by the respondent in the office of the Secretary of State shortly after the election of 1912. The remainder, the seventh and eighth, relate to other matters and are practically negligible as has been admirably shown in the opening address of Senator Hinman on behalf of the respondent. Because of this report the impeachment managers have made the State to reverberate with all the volume of vociferation that would have been directed against a Benedict Arnold or an Aaron Burr, against one guilty of "treason, strategems and spoils."

The entire Penal Law has been ransacked for epithets and characterizations. A veritable Newgate calendar has been evolved out of that single act. Article 1 makes it a violation of the corrupt practices act. The kaleidoscope is shaken, and article 2 converts it into a charge of perjury. Article 3 makes it

bribery; article 4, the suppression of evidence in violation of section 814 of the Penal Law; article 5, the preventing and dissuading a witness from attending under a subpoena, in violation of section 2441 of the Penal Law; article 6, larceny, in violation of sections 1290 and 1294 of the Penal Law. Certainly the ingenuity of trained prosecutors, provided with microscopical eyes that see bad in everything, and behold everywhere the microbe of crime, has been strained to the utmost.

When we further analyze this collocation of offenses, we cannot fail to be impressed by the fact, which has been elaborately presented to this Court at the opening of this trial, that the three fundamental charges, those which have been made the subject of the most minute investigation before this tribunal, and in the consideration of which weeks have now been occupied, relate to acts or transactions all of which occurred and were completed before the respondent entered upon the performance of his duties as Governor, and took his constitutional oath of office. The evidence has not in any way changed the propositions which were discussed at the very opening of this trial. The Court has wisely reserved the determination of the question as to whether those transactions, assuming them to have been established as pleaded and to constitute the offenses characterized in the articles, constitute ground for impeachment. That question must now be decided. Will impeachment lie in this State for acts which do not constitute "wilful and corrupt misconduct in office?" We assert the negative. The arguments which we have adduced in support of our contention constitute a part of the record. They have been ably and exhaustively elaborated by my associates, Judge Herrick, Judge Vann and Mr. Fox. I would not presume, therefore, to enlarge on the reasoning which they have advanced. Yet, in view of the length of time which has elapsed since they were heard on this subject, it may not be amiss to summarize the argument, in order that the mind of the Court may be refreshed.

It must be a fundamental principle in every system of jurisprudence, especially in so far as it relates to the administration of the criminal law, that the law whose infraction is sought to be enforced, must have existed before the pronouncement of judgment, and before the perpetration of the act of commission or of

omission which is sought to be punished. The lawmaking power must act before the judicial power may pronounce judgment. The legislative and the judicial power cannot coexist in the same entity under a free government. In the days of barbarism, and in those lands where despotism and autocracy prevail, the lawmaker and the judge are frequently one and the same person. Tyranny inevitably follows, human rights are disregarded, those in power hold those subject to their control in virtual slavery, and government is but the shadow of a name to mask the exercise of arbitrary power. Under such a system, law, reason, authority, mean nothing. Caprice, passion, prejudice, are the incentives to action. One who has fallen into disfavor may be haled before the judicial legislator or the legislative judge, on one charge or another, or upon no charge, and may be convicted by the operation of any motive which at the moment may seem sufficient to the legislative tribunal.

Under our system of government, the legislative and the judicial departments are separate and independent, and the Court can only condemn in accordance with preexisting law. Not only are the courts thus confined and limited in the exercise of their powers, but not even the Legislature can declare that to be a crime which was not so defined at the time of the commission of the act which is sought to be punished. Legislation which offends against this principle is called ex post facto, and has been deservedly condemned as in violation of the first principles of liberty and justice. A tribunal for the trial of impeachments, especially under the enlightened jurisprudence of New York, is a court, a judicial body. This Court derives its existence from the judiciary article of the Constitution. It is entirely stripped of legislative power, even though a majority of its membership consists of legislators. When they became members of this Court, they ceased to be legislators, and became judges, and the oath which they have been required to take in order to qualify them for membership in this Court is one which requires them, not to legislate, not to make law, but to hear, try and determine the impeachment upon which they are to pass judgment, according to the evidence.

This tribunal, therefore, being judicial in its nature, and in no sense of the word legislative, must necessarily move within a certain, defined area. It cannot act without restriction, without

limitation, according to its own sweet will — "uncribbed, uncabined, unconfined." To so declare, would place it within the power of the Assembly and of this Court to remove from office arbitrarily any and all public officers of this State — one because he is tall, another because he is short: A because he is a Republican, B because he is a Democrat, and C because he is a Progressive. D may be removed because he belongs to one church, and E because he is a member of another creed. One judge may be removed from office because he believes in a strict construction of the Constitution, another because he believes in a liberal interpretation. One man may be removed from office because he eats peas with a knife, and another because he uses a fork for that operation.

If unlimited power is once conceded — and our opponents assert the existence of such unlimited power — then government of the people would become a mere by-word and a hissing, because the will of the people as announced at the polls would be promptly set aside by the removal from office of those elected, for any reason, or no reason, whatsoever.

It could never have been contemplated by the people that such tremendous powers should be conferred upon any of the constitutional agencies which they created. The very suggestion of the existence of such a power bears within it the seeds of destruction. The people, by adopting a Constitution giving such power, would have placed a frozen viper in their bosoms.

It being, therefore, inconceivable that such unlimited power of impeachment exists, it is important to determine what limitation has been placed upon this tribunal with respect to the exercise of the power to convict upon an impeachment.

In many of the Constitutions of the various states of the Union, it is expressly provided that the power to impeach is to be exercised only for misconduct in office. I believe that that expression is to be found in twenty-four of the Constitutions, while in others there are added various other grounds. The Constitutions of New York of 1777 and 1821 specified as grounds for impeachment, originally, "mal and corrupt conduct in office," to which were subsequently added "high crimes and misdemeanors." In 1846 the Constitution was revised, and the language of the former

Constitution, in so far as it defined the grounds of impeachment, was eliminated. But certainly that could not, when one considers the political conditions of those days, have been intended as a bestowal of arbitrary power upon the Court of Impeachment or upon the Assembly. Those who framed the Constitution of 1846 were exceedingly jealous of arbitrary power. They abolished every vestige of it as it formerly existed. They took away from the Senate the power to sit as a Court of Errors in review of the decisions of the Supreme Court. The Council of Revision had passed out of existence, and the Convention of 1846 refused to re-create it. The centralization of governmental power was offensive.

Nothing could, therefore, have been farther removed from the minds of the framers of the Constitution of 1846 than the thought that the Court of Impeachment should be unrestricted in its exercise of power. When one but reflects that the Constitution of 1846 was intended to extend the power of the people in the selection of their officials, that it was that Constitution which made the judiciary of this State elective, instead of appointive, as it had previously been, is it possible to believe that the power to remove from office, arbitrarily, those who had been voted into office by the people, could have been considered with any degree of equanimity?

And yet, according to the contention of our opponents, if the people had, in 1847, voted into office thirty-two judges of the Supreme Court, at the very next session of the Legislature the Assembly might have impeached all of them on political grounds, and the Court of Impeachment could have sustained the charges, either on the grounds presented, or for any reason which it might have deemed sufficient; either that the judges were too young or too old, that they were college graduates, or that they had never attended a college. The very suggestion comes to one with a shock.

It is evident, however, from the legislative history of this State, which gave a practical interpretation to the Constitution, that it was always believed that it was within the power of the Legislature, by a law enacted before the fact, and not after the fact, to define the jurisdiction of the Court of Impeachment, and the grounds on which a public officer might be impeached. There

have been on the statute book, almost from the adoption of the Constitution of 1777, statutes regulating the Court of Impeachment and its proceedings, and defining the powers of the Court, following the language of the Constitution in respect to such definition, so long as that instrument undertook to define the powers of the Court. Immediately after the adoption of the Constitution of 1846, when the criminal law of this State was sought to be codified, it was proposed to change the statute law with regard to the subject of impeachment, by limiting the jurisdiction of the Court for the Trial of Impeachments to cases of wilful and corrupt misconduct in office. This code was not enacted until 1881, and ever since, during the past thirty-two years, section 12 of the Code of Criminal Procedure has defined the jurisdiction of this Court to be, "to try impeachments presented by the Assembly . . . for wilful and corrupt misconduct in office."

This statute was in force in 1894, when the last constitutional convention sat. The framers of the judiciary article contained in that Constitution, as well as the members of the Constitutional Commission of 1891, were familiar with this legislation, and when they reenacted, with one change only, the provision of the Constitution of 1846 which related to the Court for the Trial of Impeachments, they necessarily adopted that section, with the legislative interpretation which had been given to it. This, as has been argued here by Judge Parker with respect to another point, was in accordance with the well-recognized rule which has been applied over and over again in the interpretation of constitutional provisions, just as a similar principle has been frequently applied when a provision contained in the Constitution or a statute of another state is adopted by us. The language of such adopted provision is to be read in conjunction with the decisions and statutes which have interpreted it.

In his argument, Judge Herrick has presented another reason in support of this contention, in a narration of what occurred subsequent to the adoption of the Constitution of 1894 with respect to the amendment of the Code of Civil Procedure and of the Code of Criminal Procedure, so as to conform them to the new Constitution. Inasmuch as that argument is somewhat personal to myself, I will refrain from commenting upon it, further

than to say that, by reason of the decisions of the Court of Appeals to which Judge Herrick referred, the force of our contention is greatly accentuated.

There is, therefore, an overwhelming argument in favor of the practical interpretation that has been given to the Constitution, in respect to the definition of the jurisdiction of this honorable Court.

In People ex rel. Einsfeld v. Murray, 149 N. Y., such a practical interpretation was held to be of the most conclusive character, even with regard to a provision in the Constitution, which, in its terms, seemed to be explicitly prohibitive of the legislation which was nevertheless decided to be constitutional.

Not only has there been this legislative definition of the jurisdiction of this Court, but the limitation upon the right of impeachment as referring to official misconduct, has been in practice recognized. The Assembly of 1853 made a pronounced declaration to that effect. No public officer has ever been impeached in this State except for wilful and corrupt misconduct in office. I am not unmindful of the Guden case. That was not one of impeachment, and, as has been shown in the arguments heretofore presented on behalf of the respondent, that case, far from being an authority against us, strongly supports our position.

Moreover, the history of impeachment, not only in this country but also in England, unmistakably shows that, for more than three centuries, there has not been a case of impeachment which was not grounded on official misconduct.

At page 588 of Foster on the Constitution, the author says:

> "An examination of the English precedents will show that although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the State at large."

In a note he cites some 48 cases of impeachment, and every one of them is of the character indicated in the text.

The counsel for the impeachment managers, with commendable industry, collated in their brief every case of impeachment of

Federal and state officials which is to be found in the annals of this country. They are some 71 in number. In every single instance the impeachment was for misconduct in office. This is the first time, in 135 years of American constitutional history, when the attempt has been made to impeach any public officer for any cause other than misconduct in office.

Is the impeachment of William Sulzer to usher in a new era in this country? Is a new precedent to be established, in order that he may be removed from the office to which he was elected, without regard to official misconduct on his part? If that can be done in the present instance, then, as was well said by Judge Vann, whom all of us love and revere, this Court could convict the Governor of the State and remove him from office "because he stole cherries when a boy or spat on the sidewalk when a man."

The power to impeach was never intended to apply to any action or to any crimes other than those constituting official misconduct. The ordinary courts are provided with ample machinery to deal with crimes which are not acts of official misconduct, or which were committed by one not in office at the time of their perpetration. It could never have been contemplated that this Court, with its large membership and unwieldly structure, should be convened for the purpose of trying charges which do not constitute official misconduct. The expense of maintaining such a tribunal is enormous. The inconvenience to the members of the Court cannot easily be calculated. There is no necessity, nor is there any reason for converting this Court into one for the trial of ordinary crimes. The Supreme Court, the county courts, the courts of general sessions, are better adapted for their trial, and it must have been contemplated by the framers of the Constitution, that trials of such questions as those which pertain to nonofficial action should be brought in the usual course before the regular tribunals designed therefor.

Our opponents are, necessarily driven to the proposition that section 12 of the Code of Criminal Procedure is unconstitutional, and this in spite of the fact that there is not to be found in the judiciary article any language which prohibits the Legislature from the exercise of the power to define the jurisdiction of this Court. The absence of such a prohibition is fatal to the argu-

ment, for it is well settled with regard to our State Constitution that if there is no constitutional prohibition or limitation upon the exercise of legislative power, the power to legislate is plenary.

We therefore urge, with all the force we can command, that articles 1, 2 and 6, which confessedly do not relate to misconduct in office, should not be considered by this Court, because they lie beyond its jurisdiction.

The Court having, however, reserved the determination of its right to act upon these articles until the final vote is taken upon the articles as an entirety, it becomes necessary to discuss these, together with all the other articles, with a view to determining whether, on the assumption that the Court shall declare section 12 of the Code of Criminal Procedure unconstitutional, a case is made out against the respondent in law and in fact, upon any of the eight articles which he has been called upon to meet.

It will aid us in the consideration of this phase of the discussion to regard generally the nature of these proceedings and the rule of procedure applicable thereto. We begin with the proposition, that this is a criminal proceeding and is governed by the special doctrines applicable to criminal trials, as distinguished from the trials of civil actions. An unbroken line of precedents so declares. I doubt whether it has ever been suggested by any respectable authority that an impeachment proceeding is any other than a criminal proceeding. The articles of impeachment have been likened to an indictment. They cannot be amended except by the body which impeaches. The proceedings are highly penal. They involve a forfeiture.

Article 6, section 13, of the Constitution provides for the acquittal or conviction of the person proceeded against. These are terms peculiar to the criminal law. The judgment which is to be pronounced is not only judgment of removal from office, but also disqualification from holding or enjoying any office of honor, trust, or profit under the State. In the Bill of Rights, it is spoken of in juxtaposition with the obligation to answer "for a capital or otherwise infamous crime;" and in article 6, section 6, it is spoken of in its relation to the granting of reprieves, commutations and pardons after conviction, and is treated as an

offence in the phrase, "for all offences except treason and cases of impeachment."

So important is it in the present case to understand fully the nature of such a proceeding, and the rules specially applicable thereto, that I would consider myself as neglectful of my duty to the Court if I did not in some detail discuss the authorities bearing upon the subject.

This proceeding being one for impeachment, it is to be governed by the general rules applicable to other criminal prosecutions. Commonwealth v. Thompson, 13 B. Mon. (Ky.) 159; People ex rel. Miller v. Wuerster, 91 Hun 233; People v. Police Commissioners, 13 App. Div. 69, 70.

This proposition is admirably stated by Webster in his famous defence of Judge Prescott, where he said, volume 10, Writings and Speeches of Daniel Webster, Little, Brown & Company edition, page 245:

> "I take it to be clear that an impeachment is a prosecution for a violation of existing laws; and that the offence, in cases of impeachment, must be set forth substantially in the same manner as in indictments. I say substantially, for there may be in indictments certain technical requisitions, which are not necessary to be regarded in impeachments. . . . An impeachment, it is well known, is a judicial proceeding. It is a trial, and conviction in that trial is to be followed by forfeiture and punishment. Hence the authorities instruct us that the rules of proceedings are substantially the same as prevail in other criminal proceedings."

Citing: 2 Wooddeson 611; 4 Bl. Com. 259; 1 Chitty's Criminal Law 169; 1 Hetsell's P. C. 150.

At page 249 he continued:

> "I beg leave to ask, sir, of the learned managers, whether they will, as lawyers, express an opinion before this Court that this mode of accusation is sufficient? Do they find any precedent for it, or any principle to warrant it? If they mean to say, that proceedings in cases of impeachment are not subject to rule, that the general principles applicable to other criminal proceedings do not apply; that this is an intelligible,

though it may be an alarming course of argument. If, on the other hand, they admit that a prosecution by impeachment is to be governed by the general rules applicable to other criminal prosecutions; that the Constitution is to control it; and that it is a judicial proceeding; and if they recur, as they have already frequently done, to the law relative to indictments for doctrines and maxims applicable to this proceeding; I again ask them, and I hope in their reply they will not evade an answer, will they, as lawyers, before a tribunal constituted as this, say that, in their opinion, this mode of charging the respondent is constitutional and legal?"

In the argument of William Wirt on the impeachment trial of Judge Peck, that great lawyer said:

"The respondent has answered, denying the charge in both its aspects, of an unlawful act and a guilty intention. The burden is on the managers to make good the charge, both as to the illegality of the act, and the guilt of the intention. It is not enough for them to prove that the act was unlawful (though this I apprehend is far beyond their power), but they must go further and prove that this unlawful act was done with a guilty intention. Even if the judge were proven to have mistaken the law, that would not warrant a conviction, unless the guilt of intention be also established; for a mere mistake of the law is no crime or misdemeanor in a judge; it is the intention that is the essence of every crime. The maxim is (for the principle is so universally admitted that it has grown into a maxim) *actus non facit reum nisi mens sit rea*. . . . Now, if the respondent thought that he was acting lawfully, and so acted with the intention to discharge what he conceived to be his duty as a judge, he cannot be guilty of this charge; for he could not have taken this step with the intention wrongfully and unjustly to oppress and injure Mr. Lawless under color of law. . . . Now, sir, this proposition the honorable managers are bound to establish, in both its terms, by the evidence in the case. It will not be enough for them to excite a suspicion, to raise a doubt upon the subject — to leave the minds of the honorable Court

in equilibria; they must cast the balance distinctly, remove every reasonable doubt, and place the illegality of the act, and the guilt of the purpose, beyond question, before they can expect from his honorable Court a sentence of guilty." (Trial of Judge Peck.)

This doctrine was recognized by John C. Spencer, one of the great jurists of this State, who was one of the managers, for the House, on the trial of Judge Peck, for he said (Proceedings of Trial, p. 290):

"It is necessary to a right understanding of the impeachment, to ascertain and define what offences constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act *colore officii* with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case with bad motives. To illustrate the last proposition, the eighth article of the Amendments of the Constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel and unusual punishments. If a judge should disregard these provisions, and from bad motives, violate them, his offence would consist, not in the want of power, but in the manner of his executing the authority entrusted to him, and for exceeding a just and lawful discretion."

On the trial of George G. Barnard (vol. 3, p. 2070), when the court had under consideration the article of impeachment in which it was charged that James Fiske, Jr., and Jay Gould, had presented the sum of $1,000 to a child of the respondent, and on another occasion had presented to him a number of costly chairs of the value of $500, and upwards, although the facts as charged were established by evidence, sufficient for the purpose of a civil action, a majority of the court of impeachment voted not guilty, including Chief Judge Church, and Judges Allen, Peckham, Folger, Andrews, and Rapallo; Chief Judge Church saying:

". . . And as to the chairs I think the evidence in the case — the conflicting evidence which has been produced here — is sufficient to create a doubt whether the chairs were not

in fact paid for. If I felt warranted in balancing the evidence, and in determining that question in a single action, I might come to the conclusion that the evidence of payment was not reliable; but we are here in a criminal case, where the respondent is entitled to the benefit of every reasonable doubt, both upon the facts and the law, and I cannot say that the evidence which has been produced is not sufficient to create some doubt as to whether the chairs were not paid for."

Judge Andrews said, page 2071:

". . . but I arose simply to say that I shall vote not guilty upon this article, upon the principle that this defendant is entitled to every reasonable doubt, and that that doubt as to his guilt, according to the charge, exists in my mind upon the evidence in the case."

Judge Allen said, page 2072:

"In respect to the chairs, while I concur with the Chief Judge that perhaps upon the trial of an issue in a civil action where it was necessary to determine the fact one way or the other I could bring my mind to a definite conclusion, yet there is probably in the conflict and uncertainty of the evidence enough of doubt upon the question whether the chairs were in fact a gift to require us to give to Judge Barnard the benefit of that doubt in the form of an acquittal."

In the proceedings for the removal of District Attorney Jerome, which resulted in a dismissal of the petition — and we had the pleasure of seeing him here in Court at the table of the counsel for the impeachment managers contemporaneously with the hearing of the testimony of the witness Allan A. Ryan — Governor Hughes said:

"A public officer is entitled to the same presumption in his favor as those which in accordance with the spirit of our authorities are raised in favor of any other person accused of wrongdoing. The fact that he is a public officer does not deprive him of the right to be considered innocent by fair-minded people until he is proved guilty, and to be free from the imputation of bad faith, or improper motive, until the evidence of it is clearly shown."

The passages from the opinion in the Barnard case, just referred, were quoted approvingly on the impeachment of Belknap, as Secretary of War, and the opinions then expressed by various senators were to the same effect.

See also State v. Buckley, 54 Ala. 599; State v. Robinson, 1 Ala. 482; s. c. 20 So. Rep. 30; Kilburn v. Law, 111 Cal. —; s. c. 43 Pac. Rep. 615.

In State v. Hastings, 55 N. W. 774 (37 Nebraska 96) impeachment proceedings were brought against George B. Hastings, attorney general, John C. Allen, secretary of state, and Augustus R. Humphrey, commissioner. Judge Post, in discussing the nature of the proceeding, said, at page 781:

> "Another question which is suggested in this connection is the character of this proceeding, viz.: whether it is to be regarded as a civil action or as a criminal prosecution for the purpose of the production and the quantum of proof to warrant a conviction. It may be safely asserted that the decided weight of authority in this country and in England, if indeed, there exists a diversity of opinion on the subject, is that impeachment in that respect must be classed as a criminal prosecution, in which the state is required to establish the essential elements of the charge beyond a reasonable doubt. Blackstone (4 Com. 259) thus defines the proceeding: 'But an impeachment before the Lords by the Commons of Great Britain in Parliament is a prosecution of the already known and established law, and has been frequently put in practice, being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand interests of the whole Kingdom.' In the impeachment of Belknap, Senator Wright used the following language: 'Because it does not satisfy me upon this point beyond a reasonable doubt, and because it is quite wanting in everything like directness and force. . . . I feel bound to vote 'Not guilty.'" Language of similar import was used by Senators Christiancy, Booth, Oglesby, and others. But we are fortunately not without judicial authority on the subject. In the impeachment of Barnard (1872) the judges of the Court

of Appeals of New York sat with the senators, and appear to have been consulted upon all doubtful questions. Chief Justice Church (page 2070), speaking upon the subject under consideration said: 'If I felt warranted in balancing the evidence, and in determining that question in a single action, I might come to the conclusion that the evidence of payment was not reliable; but we are here in a criminal case, where the respondent is entitled to the benefit of every reasonable doubt, both upon the facts and the law, and I cannot say that the evidence which has been produced is not sufficient to create some doubt.' Judge Andrews (p. 2071) said: 'I shall vote 'Not guilty' upon this article, upon the principle that this defendant is entitled to every reasonable doubt, and that that doubt as to his guilt, according to the charge, exists in my mind upon the evidence in the case.' Like views were expressed by other judges, but there was no dissent from the opinions above quoted; and in State v. Buckley, 54 Ala. 599, impeachment is defined as a criminal proceeding without the right of trial by jury. It is not alone in form but also in substance, a criminal prosecution. As said by Senator Sargent in Belknap's case (p. 87): 'A sentence of disqualification is a humiliating badge fixed to high crimes and misdemeanors in office.' While we have in this country no technical attainder working a corruption of blood, the sentence of disqualification to hold or enjoy any office of honor, profit, or trust which is provided by our Constitution in case of conviction by impeachment, is within the primary definition of the term. It is the extinction of civil rights and capacities, a mark of infamy by means of which the offender becomes attinctus or blackened. Ral. & Law Dic. Tit. 'Attainder'; 1 Bish. Crim. Law 966, 970, and notes. The allegation that the respondents acted wilfully and corruptly being without support, it follows that there is a failure of proof with respect to specification No. 3."

In State ex rel. Attorney General v. Buckley, 54 Ala. 599, an information was filed by the Attorney General against Charles W. Buckley, Judge of the Probate Court, praying his impeach-

ment and removal from office under the provisions of "An act to provide for the impeachment and removal from office of officers mentioned in section 2 and section — of article 7, of the Constitution of Alabama," approved March 7, 1876. Stone, J., page 617, said:

"Impeachment, like most of our proceedings, civil and criminal, came to us from English jurisprudence. In England it was regarded and treated as the highest form of criminal prosecution. There, on conviction, the severest penalties of the law could be inflicted. See Parliamentary History of England, vol. 26, 1218, *et seq.;* 4 Black. Com., 259; 2 Hale Pleas of Cro. 150; Comyn's Dig. Title Parliament L.

"Under the Constitution of Alabama, article 7, section 4, penalties in cases of impeachment 'shall not extend beyond removal from office, and disqualification from holding office under the authority of this state, for the term for which he (the officer impeached) was elected or appointed.'"

"The Constitution of the United States, article 1, section 3, subdivision 7, contains precisely the same limitations on the measure of punishment in impeachment as that found in our Constitution, save that the disqualification to hold office may, under it, be extended during the life of the offender.

"Mr. Story, in his Commentaries on the Constitution, section 688, after stating that in England 'articles of impeachment are a kind of bill of indictment, found by the commons, and tried by the lords,' adds: 'In the Constitution of the United States, the House of Representatives exercises the functions of the House of Commons, in regard to impeachment; and the Senate, for the functions of the House of Lords, in relation to the trial of the party accused. The principles of the common law, so far as the jurisdiction is to be exercised, are deemed of primary obligation and government. The object of prosecutions of this sort in both countries, is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the

imperfect organization and powers of those tribunals. These prosecutions are, therefore, conducted by the representatives of the nation, in their public capacity, in the face of the nation, and upon a responsibility which is at once felt and reverenced by the whole community. The notoriety of the proceedings, the solemn manner in which they are conducted, the deep extent to which they affect the reputations of the accused, the ignominy of a conviction which is to be known through all time, and the glory of an acquittal which ascertains and confirms innocence — these are all calculated to produce a vivid and lasting interest in the public mind, and to give to such prosecutions, when necessary, a vast importance, both as a check to crime and an incitement to virtue.

"The same author, in section 798, says: 'It is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevail.' See also, sections 759, 764, 781; 1 Bish. Cr. Law, sec. 915 (362); 9 Appleton's Amer. Cyclopaedia, 197; 4 Kent Com. (marg.) 289; Bouv. Law Dict. 'Impeachment.'

"The authorities above hold that removal from office and disqualification to hold office are criminal punishment. But the doctrine has been carried much farther.

"In Ex parte Garland, 4 Wal. 333, it was shown that Mr. Garland had, before the war, been licensed to practice law in the Federal courts. Having subsequently participated on the side of the Confederates in the war between the sections of the Union, the question was whether he should be allowed to practice his profession, without taking the oath prescribed by the act of Congress of January 24, 1865. That act declared that 'no person shall be admitted as an attorney and counselor to the bar of the Supreme Court, or to the bar of any circuit or district court of the United States,' etc., 'or be allowed to appear and be heard by virtue of any previous admission,' etc., 'unless he shall have first taken and subscribed the oath, . . . that he has never voluntarily borne

arms against the United States since he has been a citizen thereof; that he has voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto,' etc. It was ruled by the court that 'to take away the right to practice law, guaranteed to Mr. Garland by his license previously obtained, was punishment for past conduct; that it imposed a punishment for some of the acts specified, which were not punishable at the time they were committed, and to others of the acts it adds a new punishment to that before prescribed, and it is thus within the inhibition of the Constitution against the passage of an ex post facto law.' The only punishment which the act imposed, was a deprivation of the right to practice law in the United States courts.

"To the same effect as was the case above, and for the same reasons, are the cases of Cummings v. State of Missouri, 4 Wal. 277; Ex parte Wm. Law, 35 Geo. Rep. 303; Impeachment of Andrew Johnson; Rev. Code, sec. 3755; Ex parte Dorsey, 7 Por. 293. The case last cited was decided by this court near forty years ago, and has never been overturned. In his opinion, Mr. Justice Goldwaite says: 'I have omitted any argument to show that disqualification from office, or from the pursuits of a lawful avocation is a punishment; that it is so, is too evident to require any illustration; indeed, it may be questioned whether any ingenuity could devise any penalty which would operate more forcibly on society.' Mr. Justice Ormond concurred with him in the opinion that the statute they were construing, whose only penalty was disqualification to hold office, or to practice law, was 'highly penal.'

"We feel constrained to hold that impeachment, under our Constitution, is a criminal prosecution."

In Professor Theodore W. Dwight's article in 6 Am. Law Reg., page 257, in speaking of the nature of the proceeding of impeachment on page 261, he says:

"The effect of an impeachment, like that of an indictment, is simply that there is apparent reason to believe that there has been a criminal violation of the laws by the individ-

ual impeached. He may in proper cases be arrested and held in custody or required to give security. The law still presumes his innocence and can do no more than to take such steps as may be necessary to render his attendance at the trial certain. The trial must be conducted in accordance with the rules of evidence observed in the ordinary courts; the person impeached can only be convicted of a crime known to the law, the punishment follows that attached to the same crime by the ordinary courts. Forfeiture of rights can only occur after conviction. Impeachments, like indictments, are methods of procedure in criminal cases and nothing more."

In State ex rel. Attorney General v. Tally, 102 Ala. 25, 15 Southern 722, impeachment proceedings were brought to remove respondent from office for misdemeanors in office. McClellan, J., said, at page 35:

"Without discussing at present other objections to testimony which may be ruled upon in the course of this opinion, we will proceed to state and consider the evidence with reference to the guilt or innocence of the respondent of the charges brought against him by the information, premising that we recognize the rule of conviction beyond a reasonable doubt as applicable to this case, and that our minds must be convinced to that degree of the guilt of the respondent before we can adjudge him guilty as charged."

In State v. O'Driscoll, 3 Brev. (S. C.) 526, impeachment proceedings before the Senate, Brevard, J., said, at page 528:

"Besides, so far from considering the trial by impeachment as oppressive, it appears to me a great constitutional privilege, an honorable distinction in favor of distinguished citizens, invested with civil employments, and places of public trust and emolument, by the choice or appointment of the people or their public functionaries; and the rights of the accused on such trials are cautiously guarded and greatly favored. The House of Representatives have the sole power of impeaching, and the Senate the sole power of judging. A concurrence of two-thirds of the first branch of the Legisla-

> ture is necessary to an impeachment; and a like concurrence of the members present of the Senate is necessary to convict; and the Senate may be considered as a select grand jury, men of experience and tried wisdom, and of the first respectability in the state, acting under the solemn sanction of an oath or affirmation, as in the usual course of criminal proceedings of courts of justice."

Bearing in mind, then, the doctrine which has just been illustrated, and treating this case as a criminal proceeding, governed by all the rules which the humane policy underlying our criminal jurisprudence prescribes, we come to the analysis of the several articles in their general legal aspects, along broad lines, as distinguished from a minute examination into the evidence bearing on the several charges, which, if necessary, will become the subject of later discussion and consideration. For convenience of treatment, we shall take up articles 1, 2 and 6, those to which the impeachment managers have principally addressed themselves, and which, as is evident, have been considered by them the very backbone of the skeleton which they have sought to clothe with the flesh and blood of an avenging Nemesis.

Article 1 is confessedly an attempt to charge a violation of those sections of the election law known as the corrupt practices act. Briefly stated, it is charged that the respondent was required by the statute in force on November 12, 1912, to file in the office of the Secretary of State, within twenty days after his election, a statement setting forth all the receipts, expenditures, disbursements and liabilities made or incurred by him as a candidate for Governor at said general election, which statement, it is claimed, "the statute required to include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement exceeding five dollars, the name of the person or committee to whom it was made and the date thereof, and all contributions made by him." It is then stated that he filed in the office of the Secretary of State what purported to be such a statement, which showed receipts from sixty-eight contributors aggregating

$5,460, and ten items of expenditure aggregating $7,724.09, the detailed items of which were fully set forth in said statement so filed as aforesaid.

It is then alleged that the statement thus made and filed "was false and was intended by him (the respondent) to be false and an evasion and violation of the statutes of the state, and the same was made and filed by him wilfully, knowingly and corruptly," it being false in the particulars that it did not contain the contributions that had been received by him and which should have been set forth in the statement, from various individuals named, and that in making and filing such false statement he did not act as required by law, but in express violation of the statutes of the State.

It is not alleged or pretended that this act constituted a felony, or a misdemeanor, or a crime of any kind whatsoever. It is not pretended that the account was not in all respects accurate, in so far as it related to the expenditures made by the respondent. Nor is it pretended that the report did fully state all contributions made by him. The sole allegation and the only contention that has been made, and which the respondent was called to meet, is, that the statement filed by him did not state all of the contributions received by him.

The first question, therefore, that arises under this article is, whether or not, under the statute, construed as a penal statute should be construed, the respondent was under any legal duty to make a full statement of the contributions received by him from others, as distinguished from contributions made by him and the moneys expended by him in connection with his election.

Although this subject has, to some extent, been discussed at an earlier stage of this trial, it is nevertheless believed to be of such pith and moment that it is proper to make a further and closer examination into the statutes relating to the reports required to be made by candidates for office.

Proceeding in chronological order, it is important first to consider what is now section 776 of the Penal Law, but what originally was section 41-w of the Penal Code, enacted by Laws of 1892, chapter 693, section 1, which, as will presently appear, was amended in one particular by chapter 439 of the Laws of 1910

and reenacted so as to go into effect on September 1, 1910. That section, so far as material, reads as follows:

> "Every candidate who is voted for at any public election held within this State shall, within ten days after such election, file as hereinafter provided an itemized statement showing in detail all moneys contributed or expended by him directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who receive such moneys, the specific nature of each item, and the purpose for which it was expended or contributed. There shall be attached to such statement an affidavit subscribed and sworn to by such candidate, setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Candidates for offices to be filled by the electors of the entire State, or any division or district thereof, greater than a county, shall file their statements in the office of the Secretary of State. . . . Any candidate for office who refuses or neglects to file a statement as prescribed in this section shall be guilty of a misdemeanor."

As originally enacted, the last clause of this section ended with the phrase, "and shall also forfeit his office." This latter clause was stricken out by the amendment of 1910, to which reference has just been made, it having been held in Stryker v. Churchill, 39 Miscellaneous Reports 578, that such a forfeiture clause as applicable to an elected candidate is unconstitutional, in that it imposes an official test other than that prescribed by section 1 of article 13 of the Constitution, which declares that no other oath, declaration or test, save that therein set forth, shall be required as a qualification for any office of public trust.

This section referred to a statement by the candidate. It related to two subjects only, the moneys contributed by the candidate and the money expended by the candidate, directly or indirectly, whether by himself or through any other person. This idea is ex-

pressed three times in this comparatively short section. It had reference only to contributions and expenditures by the candidate, and not contributions made to him.

It would be impossible to construe it as having reference to contributions made to the candidate. That would be doing violence to the entire structure of the sentence. The idea which was then in the mind of the lawmakers was, to deal solely with the acts of a candidate, and not with the acts of anybody else. There had been serious complaint with regard to large contributions made by candidates to political parties, or otherwise, for the purpose of accomplishing their election. It was claimed that men of small means would be prevented from running for office, because of the necessity of making large contributions and spending large sums of money.

Throughout this section, therefore, the idea is expressed over and over again, that it is the candidate's contribution and the candidate's expenses as to which information is required. The statement makes it necessary to give the names of the various persons who received the moneys, the specific nature of each item, and the purpose for which it was expended or contributed. Nothing is said as to the names of persons from whom money is received. It is therefore evident that the framers of this legislation, having in mind merely a single contributor, the candidate, did not consider it necessary to add the futile statement requiring the giving of the name of the only contributor whom they had in mind, and, therefore, necessarily contented themselves with calling for the names of the persons who received the moneys which were contributed or expended.

This idea becomes even more clear when one reads section 779, which prohibits any person from soliciting money from a candidate for an elective office, and section 780, which declares that no candidate for a judicial office shall directly or indirectly make any contribution of money or other thing of value, nor shall any contribution be solicited of him. This indicates beyond the peradventure of a doubt that what the Legislature had in mind was simply the subject of contributions by candidates for office. It did not assume to deal with contributions made to them.

That this is the keynote of this entire legislation is further indicated by section 781, which limits the amount which may be expended by candidates. Thus, a candidate for Governor is restricted to the expenditure of the sum of $10,000. It is very evident that this could not have been intended to refer to expenditures made by any other person in connection with an election for Governor, because it would be utterly impossible to conduct an election for Governor if the sum total which might be expended for or on behalf of such a candidate were limited to $10,000. The expenses of conducting public meetings, of travel, and for other legitimate purposes, under the most favorable conditions, would largely exceed that sum.

Hence there is no room for doubt that section 776 could have had no other object than to refer to the contributions made by a candidate, and not to such contributions as might be made to him or for him, by third parties.

This act, being a penal act, must be governed by the general rules of construction applicable to such acts. Nothing is to be read into it, but it should be construed with strictness, especially since the requirements which it contains are purely the creation of statute; nothing is to be implied, the language is to be read in its natural sense, and words which will not be found in the statute are not to be supplied in order to create, by construction, a duty which is not specified in the legislative enactment, in order that a penalty may be visited upon him who fails to comply with the duty thus artificially superimposed upon the terms of the statute.

This would be the first time in the history of penal legislation when, by a liberal construction, that would be converted into a crime which, according to the plain reading of the statute, is not so intended to be made, and when, by the strict though not unreasonable construction, to which we are entitled, there could not by any possibility be spelled out an intention to create the duty or the crime resulting from a breach of such interpolated duty.

This brings us to a consideration of article 20 of the election law, relating to corrupt practices. As has been said in the course of the discussion, this statute is exceedingly inartificial,

blind and confusing. It found its way into our legislation by chapter 502 of the Laws of 1906. Sections 541, 542 and 546 were subsequently amended by chapter 596 of the Laws of 1907. Section 776 of the Penal Law, having been reenacted in 1910, it is evident that the latter act is still in force, and if there is any inconsistency between it and the corrupt practices article, it must be deemed to control.

The evident purpose of this article was, to require reports to be made, not only by a candidate, under section 776 of the Penal Law, but also by political committees, and with respect to the latter the requirements extended beyond those which a candidate was required to observe under section 776 of the Penal Law.

The corrupt practices act consists of twenty-one sections, numbered 540 to 560, both inclusive. By section 540 a political committee is defined. Section 541 relates to a statement of campaign payments not made through a political committee. That section reads as follows:

> "Any person, including a candidate, who to promote the success or defeat of a political party, or to aid or influence the election or defeat of a candidate or candidates for public office . . . shall give, pay, expend or contribute, any money or other valuable thing except to the chairman, treasurer or a member of a political committee, or to an agent duly authorized thereto in writing by such committee, or to a candidate or an agent of such candidate authorized by the candidate thereto in writing, or except for personal expenses as hereinafter provided, shall file the statement required by section five hundred and forty-six, and shall be subject to all the duties by this chapter required of a political committee or the treasurer thereof."

This merely refers to the duty of a person making a contribution, whether he be himself a candidate for office or not. It refers to a contribution by any person, including a candidate, and has reference to the duty of the person who makes the contribution, and not of the person to whom the contribution is made.

Section 546, to which reference is made in section 541, reads as follows:

"The treasurer of every political committee which, or any officer, member or agent of which, in connection with any election receives, expends or disburses any money or its equivalent, shall, within twenty days after such election, file a statement setting forth all receipts, expenditures, disbursements and liabilities of the committee, and of every officer, member and other person in its behalf. In each case it shall include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement, the name of the person or committee to whom it was made, and the date thereof; and unless such expenditure or disbursement shall have been made to another political committee, it shall state clearly the purposes of such expenditure or disbursement. . . . The statement to be filed by a candidate or other person not a treasurer, shall be in like form as that hereinbefore provided for, but in statements filed by a candidate, there shall also be included all contributions made by him."

The reference in section 546 to "the statement to be filed by a candidate or other person not a treasurer" harks back to section 541, which in turn refers to section 546. As has already been seen, section 541 relates to the duty of a person, "including a candidate," who contributes money to any person other than the chairman, treasurer or member of a political committee, or to an agent duly authorized thereto in writing by such committee, or to a candidate or agent of a candidate. Here, again, this refers to a statement of payments made by, and not of payments to, the person called upon to make the statement. Hence, when section 546 refers to a statement by the persons referred to in section 541, it is obvious that such statement can only be one which deals with the subject matter of section 541, namely, payments by, and not payments to, the individuals therein referred to.

In order to make it certain that, so far as a candidate is concerned, he is called upon to make only the statement specified in section 541, and in order to avoid the possibility of an interpretation that he is not called upon to make the statement required by

section 776 of the Penal Law, it is enacted that, "in statements filed by a candidate there shall also be included all contributions made by him." If the statement to be filed by a candidate referred to in section 541 had reference to anything other than the subject matter of section 541 of the election law, and that such statement would have to be in all things like the statement required from the treasurer of a political committee, what would have been the sense in expressly stipulating that the statement to be filed by a candidate shall include all contributions made by him?

Even this statement is subject to the further exception contained in section 541, that it need not contain a statement of the personal expenses set forth in section 542 of the election law, which provides that a candidate "may incur and pay in connection with such election, his own personal expenses for travel and for purposes properly incidental to traveling; for writing, printing and preparing for transmission any letter, circular or other publication not issued at regular intervals, whereby he may state his position or views upon public or other questions; for stationery and postage; for telegraph, telephone and other public messenger service; but all such expenditures shall be limited to those which are directly incurred and paid by him."

Then follows the provision: "A candidate shall in any event file a statement of any contributions made by him," which is again inserted out of abundance of caution, to avoid the implication that section 776 of the Penal Law is to be superseded.

It is evident that the statement to be filed by a candidate cannot be the equivalent of the statement of campaign receipts and payments required of the treasurer of a political committee. If it had been so intended, it would have been simplicity itself to have stated, that a candidate shall file just exactly such a statement as the treasurer of a political committee is called upon to make. The very fact that there is a differentiation in the terms and phraseology of the statute with respect to the statement to be filed by a candidate, shows that his statement is of an entirely different character from that which is to be made by the treasurer of a political committee, and that it can have reference only

to expenditures and contributions made by him, and not to any contributions made to him.

The fact that the statement filed by the candidate shall be in like form as that theretofore provided must necessarily mean that, so far as applicable, the statement shall be in like form. That phrase is to be read distributively; otherwise it would result in a meaningless jumble of words, which, to a great extent, would be left without force or meaning, a consequence to be avoided in the interpretation of any statute. Our interpretation, on the other hand, gives full effect to every word or phrase contained in this statute, and, in consequence, is the more acceptable interpretation.

Section 544 does not in any manner affect the proposition which we are now discussing, because it refers to a person acting as an officer, member, or under authority of a political committee, or under the authority of a candidate, who receives any money or its equivalent, or expends or incurs any liability to pay the same. It does not refer to the candidate himself, or to any duty owed by him.

The corrupt practices article, as has been seen, and as will be hereafter more fully discussed, does not require an oath to the statement filed under its provisions. It merely calls for a statement. It nowhere refers to the word "affidavit," or to a sworn statement or verified statement. Moreover, there is no provision in the statute which makes its provisions self-executing. The mere failure to file a statement, or the filing of a false statement, is not in and of itself made a crime. Noncompliance with the terms of the statute is merely made the basis of contempt proceedings, which may or may not result in the imposition of a penalty.

The statute creates a new duty, establishes a new remedy for the enforcement of such duty, and prescribes a particular method of procedure. It is a proposition which runs back to the beginnings of our law, that, under such circumstances, the statutory remedy is exclusive, and if it does not declare the violation of its provisions a crime, such violation is not indictable.

In Brown v. Buffalo, etc., R. R. Co., 22 N. Y. 191, Judge Welles said (p. 197):

"In Behan v. People, 17 N. Y. 516, Pratt, J., who delivered the opinion of the court, says: 'It is well settled, that where an act is prohibited by statute, which is not criminal at common law, and a penalty is imposed in the same statute, declaring such prohibition, the act is not indictable.' The same learned judge then remarks, that the rule is based on the assumption that the Legislature, having fixed the penalty at the same time of prohibiting the act, designed that there should be no other punishment."

In People v. Stevens, 13 Wend. 341, Sutherland, J., said:

"Where a statute creates a new offense, by making that unlawful which was lawful before, and prescribes a particular penalty and mode of proceeding, that penalty can alone be enforced."

In Rex v. Robinson, 2 Burr. 800, Lord Mansfield said:

"The rule is certain, that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a special remedy against such new offense (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other."

"The principle is a very ancient one, and has never been departed from; it is a most rational interpretation of the law-making power."

In Mairs v. Baltimore & Ohio R. R. Co., 175 N. Y. 409, Judge Haight, at page 413, said:

"Where the Legislature prohibits or requires the doing of an act and prescribes a punishment that shall be inflicted for a violation of its mandate, the punishment furnishes the exclusive remedy for the wrong, so far as the public is concerned."

"In the earlier decision in People v. Hislop, 77 N. Y. 331, the Court of Appeals decided that where a statute creates a new offense making that unlawful which was lawful

before, and prescribes a particular penalty therefor, that penalty alone can be enforced; the offense is not indictable (In re Barker, 56 Vt. 26)."

In Stafford v. Ingersoll, 3 Hill 38, Mr. Justice Bronson said:

"So, where a statute creates a right which did not exist before, and prescribes a remedy for a violation of it, that remedy must be pursued." (Almy v. Harris, 5 John. 175).

So, in Renwick v. Morris, 7 Hill 575, the Chancellor declared:

"Where a new offense is created, and a penalty is given for it, or a new right is given, and specific relief given for the violation of such right, the punishment or remedy is confined to that given by statute."

It is well-settled law, that where a statute imposes a new duty where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of the breach is confined to it. Cooley on Torts, 2d ed., 783; Atkinson v. Newcastle, L. R. 2 Exch. Div. 441; Almy v. Harris, 5 John. 174; Moore v. Gadson, 93 N. Y. 12; Grant v. Slater Mills, 14 R. I. 380.

Let us now, in the light of this principle, further examine the corrupt practices article, for the purpose of indicating the application to the present case of the rule laid down in the authorities which have been cited.

Section 550 provides that, if any person or persons or committee or committees fails to file a statement or account as required, or if a statement is filed which does not conform to the requirements of the statute in respect to its truth, sufficiency in detail, or otherwise, the Supreme Court or any justice thereof may compel such person or committee to file a sufficient statement, by an order in proceedings for contempt.

Section 551 provides that these proceedings may be instituted by the Attorney General, a district attorney or a candidate, or by any five qualified voters who voted at the election in question.

Section 552 requires the petitioner to file an undertaking for costs, and provides that upon the presentation of the petition

and the giving of the security, the court or justice may grant an order directing the person against whom it is issued to show cause why he should not file a statement of election expenses or amend the statement already filed, and furnish the court or justice with such other information as may be required.

Section 553 specifies the time within which the proceedings must be brought.

Section 554 indicates the summary nature of the proceedings; and further sections provide for a preference of such proceedings over other causes, appeals to be taken therein, subpoenas to be issued, personal privilege of witnesses, and the conduct of the hearing.

Section 560 then provides for the judgment to be rendered in such proceeding, and if the person or committee proceeded against has failed to file the required statement, or has filed a false or incomplete statement, "without wilful intent to defeat the provisions of this article," the judgment shall require the person proceeded against to file such statement or such amendment to the statement, as shall render the same true and complete, within ten days of the entry of the judgment, and to pay the costs of the proceeding. If such person or committee has failed to file the statement, or has filed a false or incomplete statement, "due to the wilful intent to defeat the provisions of this article," or if the person or persons proceeded against shall fail to file the required statement or amendment as directed by the judgment, within ten days after the entry thereof, such person or committee shall be liable to a fine not exceeding $1,000 or imprisonment for not more than one year, or both. If such person or committee has filed a statement complying with the provisions of the article, or if they are not required to file the statement as prescribed, the court or justice shall render judgment against the applicant or applicants and in favor of the person or committee proceeded against, for his or their costs and disbursements.

We have, therefore, a complete course of procedure, marked out with the fullest detail, which provides of necessity an exclusive remedy. No crime, whether felony or misdemeanor, is therefore created by it. Noncompliance with its terms can only be made the basis of the specific procedure contemplated by the statute, which

may or may not result in the imposition of punishment as for a contempt.

The constitutionality of the provision with regard to punishment, contained in this statute, is doubtful, for it deprives the person proceeded against of his right of trial by jury. But, without urging that point, it is enough for the purposes of this case to demonstrate, as we believe we have, that the allegation of crime cannot be predicated upon the failure, whether wilful or otherwise, to comply with the requirements of this statute

It is contended on behalf of the prosecution, that, because section 549 of the Election Law directs the Secretary of State to provide blank forms suitable for the statements required by the statute, and that the forms which he has provided required not only a statement of expenditures made, but also of contributions received, crime can be predicated upon the untruthfulness of the statements made in filling out the blank form so provided with respect to campaign contributions received, even though there is no statutory requirement for such a statement.

The decision of the United States Supreme Court in *United States v. George,* 228 *U. S.* 14, which has already been cited, is also conclusive upon this point. The distinction between legislative and administrative functions was clearly recognized, and it was decided that, under a statutory power to make regulations, an administrative officer cannot abridge or enlarge the conditions imposed by statute. Hence, where Congress prescribed the subjects as to which a homestead claimant and his witnesses were required to make a statement under oath, the Secretary of the Interior had no power to enlarge these requirements, and perjury could not be predicated upon a false oath as to matters not required by the statute, although demanded by the Land Office in pursuance of a regulation made by the Secretary of the Interior.

The foundation, therefore, upon which the impeachment managers have built their charges against the respondent, rests upon sand. The offense charged does not conform to the allega-

tion of the articles, that it constitutes either wilful and corrupt misconduct in office or a crime or misdemeanor, high or otherwise.

We will not at this stage of the argument discuss the question as to whether the omission of the contributions specified in the articles, was wilfully, knowingly and corruptly made. That will be done in due time, and under another head. But assuming, for the moment, that the allegations contained in the statement filed were false because of the omissions alleged, and that they were intentionally false, can it be seriously argued that the statement of a falsehood is ground for impeachment? If it is, then many a high official in this country has subjected himself to the pains and penalties of impeachment. Many a charge of falsehood has hurtled through the air. The Ananias Club has been largely recruited from the ranks of officialdom, and if a falsehood uttered by one who is elected to office, before he enters upon the performance of his duties, may be made the basis of impeachment, where shall the line be drawn, and by whom? Though the Psalmist, when he said in his haste, that all men were liars, was somewhat inaccurate, or else mankind has greatly improved since the utterance of this striking passage, yet even in our day, if the telling of a lie, whether of the black or white variety, were once recognized as ground for impeachment, there would be many vacancies in office to be filled.

We now come to the second article, wherein it is charged that the respondent committed wilful and corrupt perjury, in that he attached to the statement filed by him an affidavit in which he swore that the statement was in all respects true, and was a full and detailed statement of all moneys received or contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election; that this statement was false in that it did not contain the contributions that had been received by the respondent from Jacob H. Schiff and others. These acts are charged as constituting a violation of section 1620 of the Penal Law. That section reads as follows:

> "A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration,

deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may be lawfully administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, wilfully and knowingly testifies, declares, deposes, or certifies falsely in any material matter, or states in his testimony, declaration, deposition, affidavit, or certificate, any material matter to be true which he knows to be false, is guilty of perjury."

We have already shown that while the statement required under section 776 of the Penal Law must be verified, that required under the corrupt practices article does not call for verification. It is satisfied by an unsworn statement. So far as the statement filed conforms to the requirements of section 776, in that it states the contributions or expenses made by or incurred by the respondent, there is no question as to its truthfulness. It is only in so far as it purports to state the contributions to the respondent that it is claimed to be false, in that it does not state all of the contributions which it is asserted were made to him for election purposes.

It would seem to follow from this statement, which is indisputable, that, in so far as the affidavit made by the respondent relates to contributions made to him, it was voluntary and extrajudicial, not being an oath required by law, and hence does not come within the definition of perjury. One of the essential elements of that definition is, that the person proceeded against shall have sworn falsely on an occasion in which an oath is required by law, or is necessary. Our statute merely follows the common law in this regard. Thus, in 2 Bishop's Criminal Law, 5th edition, that great author, one of the greatest writers on the criminal law, speaking of the elements of the crime of perjury, says:

"Section 1017. The principle chiefly to be elucidated under this subtitle, is that the oath must be required in some judicial proceeding or course of justice, and the statement must be taken substantially in the form directed by law, before an officer authorized to administer it."

"Section 1019. Where a party offers himself as a witness and is accepted, his oath may have weight in determining the issue; but here it was merely voluntary and impertinent: as if a party filing a declaration in the court of common pleas should think proper to make oath of its truth." Citing State v. Halle, 2 Hill, S. C. 290; Silver v. State, 17 Ohio 365.

"Section 1021. In the United States Court — a statute providing a punishment 'if any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered, under or by any law or laws of the United States, shall upon the taking of such oath or affirmation, knowingly or wilfully swear or affirm falsely'— McLean, J., held, that an oath not required by law or by order of the court, administered by the clerk of the court, is extra-judicial, and though false, lays no foundation for an indictment." United States v. Babcock, 4 McLean 113.

"Section 1027. We are thus led to the general proposition, that no extra-judicial oath will sustain an indictment for this offence. (Pegram v. Styron, 1 Bailey 395; Landen v. State, 5 Humph. 83; Wagoner v. Richmond, Wright 173; Rex v. Foster, Russ. & Ry. 459; Jackson v. Humphrey, 1 John. 498; United States v. Nickerson, 1 Sprague 282). Therefore, in South Carolina, swearing to an account to render it in and before an administrator, has been held to be extra-judicial, not subjecting the party who swears falsely to an indictment. A like doctrine has been held in Tennessee as applicable to a case in the court of chancery, wherein there was no right to administer the oath. So, 'a false oath,'

says Hawkins, 'taken by one upon the making of a bargain, that the thing sold is his own, is not punishable as perjury.'"

In 22 Am. & Eng. Encyc. L., 2d ed. page 685, title "Perjury," it is said:

> "The oath or affidavit must be one authorized or required by law. Perjury cannot be assigned on a voluntary or extra-judicial oath." United States v. Grottkau, 30 Fed. Rep. 672; United States v. Howard, 37 Fed. Rep. 666; People v. Travis, 4 Park. Cr. 213; People v. Titmas, 102 Mich. 318; Linn v. Commonwealth, 96 Pa. St. 285.

In 30 Cyc. L. & Pr., title "Perjury," page 1411, it is said:

> "The taking of a mere voluntary oath that is nowhere authorized or required by law, is not perjury." Citing among other cases, State v. McCarthy, 41 Minn. 59.

In United States v. George, 228 U. S. 14, it was decided, in March last, that an indictment for perjury cannot be based on an affidavit not authorized or required by any law.

In People v. Martin, 175 N. Y. 319, which was cited here on a previous occasion, the only question involved was whether there could be a prosecution for perjury predicated on a false statement contained in an affidavit taken in the State of New York for use in Delaware, and it was incidentally stated that an oath that is "purely voluntary and extra-judicial" does not come within the perjury statute.

Not only is it necessary in order to constitute perjury, that the oath taken shall have been required by law, but it is also essential that the matter claimed to have been false shall have been material. That is also an express requirement of the statute. Hence, one who testifies, even wilfully, knowingly and falsely, to a material fact, does not commit perjury. That was recently decided by the Court of Appeals in People v. Teal, 196

N. Y. 376, and in this respect our statute conforms strictly with the common law. Roscoe's Cr. L., 328; 2 Russell on Crimes, 481, 489; Dunkle v. Wilds, 11 N. Y. 482; Wood v. People, 59 N. Y. 120; People ex rel. Hegeman v. Corrigan, 195 N. Y. 1.

In People ex rel. Hegeman v. Corrigan, it was held that the question whether, in a prosecution for perjury, testimony which is charged to be false is material or not, is a question of law.

Inasmuch as the respondent, as a candidate for office, was not required to make any statement as to the moneys received by him, but was confined to a statement of the moneys contributed and expended by him, this affidavit, in so far as it referred to moneys received, was immaterial, and consequently cannot be made the basis of a charge of perjury.

Not only is it necessary that the oath taken is one required by law, and that the matter charged to be false was material, but the false statement must be wilfully, knowingly and corruptly false. It must be made with criminal intent. Mere untruthfulness is not sufficient. If there was mere mistake or carelessness, or misinformation, there can be no basis for the charge of perjury.

This subject has been recently so fully considered by the Court of Appeals in People ex rel. Hegeman v. Corrigan, 195 N. Y. 1, that this Court will be greatly aided in its present deliberations by a detailed reference to that case. It was there held that to constitute perjury, there must be criminal intent. Ordinarily, criminal intent is an intent to do, knowingly and wilfully, that which is condemned as wrong by the law and common morality of the country, and if such an intent exists it is neither justification nor excuse that the actor intended by its commission to accomblish some ultimate good.

To constitute perjury, it is not necessary to establish any other intent than that specified in the statute. It is not sufficient that the affiant testifies as to what is false, but the testimony must be given wilfully and knowingly, and the affiant must know that

the testimony is false if it be given in the honest belief that it is true, or by mistake or inadvertence, the case does not fall within the statute.

As Chief Judge Cullen says:

> "The perjury with which the relator is charged is the verification under oath of a report to the Insurance Department of the State, in which in answer to a question calling for the statement of the loans held by the company secured by a pledge of bonds, stock or other collateral, it is stated that there were none. For the purpose of determining whether the evidence was sufficient to justify the magistrate in issuing a warrant, it becomes necessary to consider the rules of law applicable to the case. Section 96 of the Penal Code prescribed 'A person who swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true in an action, or a special proceeding, or upon any hearing or inquiry, or on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right or for the ends of public justice, or may lawfully be administered, and who in such action or proceeding, or on such hearing, inquiry or other occasion, wilfully or knowingly testifies, declares, deposes or certifies falsely in any material matter, or states in his testimony, declaration, deposition, affidavit or certificate any material matter to be true which he knows to be false, is guilty of perjury.'"

Doubtless, to constitute perjury, there must be criminal intent, but intent must be distinguished from motive and from ultimate object. As was said by Judge Werner in People v. Molyneux, in 168 N. Y. 264, at page 297:

> "In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. See Burrill's Law Dictionary, volume 1. Motive is that which

incites or stimulates a person to do an act. Motive is never an essential element of a crime. A good motive does not prevent the act from being the crime. Clark's Criminal Law, section 14. There runs through the criminal law a distinction between offenses that are mala prohibita, in which no intent to do wrong is necessary to constitute the offense, and offenses that are mala in se, in which a criminal intent is a necessary ingredient of the crime."

"While there are to be found both in judicial decisions and in textbooks elaborate discussions of what is a criminal intent, no attempt has been made to accurately define the term. Very possibly the attempt to make a definition so comprehensive as to be applicable to all cases would be futile, and it has often been doubted whether the term intent is an accurate one. However this may be it is very apparent that the innocence or criminality of the intent in a particular act generally depends on the knowledge or belief of the actor at the time. An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the defendant is prosecuted innocent, would be a good defense. Thus, if a man killed another under such circumstances as gave proper and reasonable grounds for the belief that the person killed was about to take the life of the slayer, although the person killed was only playing a practical joke, no crime would be committed, but, if the facts and circumstances which the person believed to exist were not such as in law to justify his act, then there would be no defence to the act. In other words, it is the knowledge or belief of the actor at the time that stamps identically the same intent as either criminal or innocent, for the intent to take life, unless, under circumstances that the law regards as sufficient to justify the killing, is the criminal intent and the only criminal intent that can exist in case of murder, excepting where the killing is done in the commission of an independent felony. So, ordinarily, a criminal intent is an intent to do knowingly and wilfully that which is condemned as wrong by the law and common morality of the country, and if such an intent exists, it is neither justification nor excuse that the

actor intended to accomplish some ultimate good." 1 Bishop's Criminal Law, section 341.

"To constitute perjury under our law it is not necessary to establish any other intent than that specified in the statute, for by its terms its is not sufficient that the affiant testifies as to what is false, but the testimony must be given wilfully and knowingly, and the affiant must know that the testimony is false; if it be given in the honest belief that it is true or by mistake or inadvertence, the case does not fall within the statutes."

As to intent in perjury, Hawkins says, 1 Pleas of the Crown (Corw. ed.), page 439, section 2:

"It seemeth that no one ought to be found guilty without clear proof that the false oath alleged against him was taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, or where it was occasioned by surprise, or inadverteney, of a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable."

Referring now to the evidence which bears upon this branch of the case, and which is the same evidence on which the impeachment managers rely to establish their charge under the first article, that the statement therein referred to was made and filed "wilfully, knowingly and corruptly," we have the facts, which have been most luminously explained by Louis A. Sarecky.

I will not take the time to analyze that testimony. I have read it as it appears in the record. The Court has heard it within the last few hours. Therefore it would merely mean a waste of time to review it and repeat it. If anything is clear it appears distinctly from the testimony of Sarecky, who testified like an honest man, without reservations of any kind, that the making of this affidavit in the manner in which it was made was due entirely to inadvertency and mistake and not to corrupt and wilful intent.

Not only do these facts indicate an absence of criminal intent, but the proof also shows that the various donors who are referred to in articles 1 and 2, so far as any evidence was given by them, did not make their gifts to the respondent specifically as campaign contributions, to be used solely to meet election expenses, but they made them for any purpose that the respondent might desire. This is well illustrated by the testimony of Jacob H. Schiff, Mr. Morgenthau, Dr. Cox and Mr. Dooling, and other witnesses.

It is not pretended that the respondent's expenditures for campaign purposes were more than $7,724.09. Hence, so far as all the purposes of the law were concerned, it was unimportant, at least under the circumstances as disclosed by the testimony it was considered unimportant, to state what gifts the respondent received, which he did not understand, and which the donors did not understand, were to be used for campaign purposes. In no event could any moneys be charged as having been received for campaign purposes, which the respondent did not understand he was required to use for that purpose. Certainly he was under no obligation to expend all the moneys which he received during the campaign, whether the money was needed or not.

The material question in this connection is, whether the respondent understood that he was called upon to account for moneys which he did not expect to use for campaign purposes, as having been received for that purpose. If he did not intend to use them for campaign purposes, if they were received by him with the understanding on his part that he was to use them for any purpose that he might see fit, he would not be guilty of wilful and corrupt swearing by omitting from his statement the moneys which he received and used for purposes other than to meet his election expenses. In fact the impeachment managers, by framing the sixth article on the charge of larceny, based on the alleged misappropriation of the very contributions mentioned in articles 1 and 2, admit that if any offense was committed it was not that of perjury.

We repeat that, in dealing with articles 1 and 2, the intent which is to be considered is not the intent of the donors, whatever that may have been, but the intent of the respondent with respect to the purpose for which the moneys were to be used by

him. The impeachment managers have been at great pains to show that he did not intend to use these moneys for election or campaign purposes. Hence the absence of the specific intent which must exist in order to constitute the crime of perjury has been incontrovertibly established by the impeachment managers themselves.

Those who have had any experience or opportunity for observation with respect to the statements made in connection with campaign contributions know that there prevails a great state of confusion in the minds of candidates for public office in regard to the statements which they are called upon to make and file. Political campaigns are conducted amid great excitement. Candidates for office are frequently men of little business experience, unaccustomed to keeping books or accounts with any degree of care or accuracy, liberal in their expenditures, and unfamiliar with the requirements of the statute, which are generally brought to their notice after the election is over, and under circumstances which make it exceedingly difficult to prepare a statement with entire accuracy. Those who have investigated the subject assert that but few candidates for office are able to comply, or actually comply, with the provisions of the corrupt practices article, not because of any intention to violate the law, but because of the difficulty of understanding it, and of in fact complying with it.

While every good citizen recognizes the wisdom of this legislation, and desires to observe it and to comply with its terms, it would be laying down a rule of exceeding harshness to declare that an intent to commit perjury is predicable upon the failure to comply with the terms of the statute. In fact the very language of the corrupt practices act, which we have quoted, indicates that it was never intended by the Legislature that perjury should be predicated upon a false statement contained in a report filed, because it is declared that if the parties who were required to file the statement have filed "a false or incomplete statement," and such "false or incomplete statement was due to wilful intent to defeat the provisions of this article," the person proceeded against shall, in the contempt proceedings indicated, be liable to a fine not exceeding $1,000 or imprisonment for not more than one year, or both. This is inconsistent with the idea that the

crime of perjury can be predicated upon a wilful and intentional filing of a false statement under the corrupt practices article; in other words, its provisions are exclusive and create an exception to the law with regard to perjury, and the only remedy is under the statute, and perjury is not intended to be predicated upon any violation of the corrupt practices act. That is accentuated by the fact that a false statement with regard to contributions made by a candidate as required by section 776 of the Penal Law is not defined as a felony but merely as a misdemeanor.

It would seem, therefore, that there is not even the shadow of a justification for the charge of perjury against the respondent.

Growing out of the same facts as those which have just been considered, is article 6, which charges the respondent with the crime of grand larceny, in violation of sections 1290 and 1294 of the Penal Law. It is alleged that while a candidate for the office of Governor various persons contributed money and checks representing money to the respondent to aid his election to the office of Governor; that such money and checks were delivered to him "as bailee, agent or trustee, to be used in paying the expenses of the election and for no other purpose whatever;" and that the respondent "with the intent to appropriate the said money and checks representing money thus contributed and delivered to him as aforesaid for his own use, having the same in his possession, custody or control as bailee, agent or trustee as aforesaid, did not apply the same to the uses for which he has thus received them, but converted the same and appropriated them to his own use and used the same, or a large part thereof, in speculating in stocks through brokers operating on the New York Stock Exchange, and thereby stole such money and checks and was guilty of larceny." The money and checks thus claimed to have been stolen is the same money referred to in articles 1 and 2.

This article charges that it is drawn under section 1290 of the Penal Law, which reads as follows:

> "Sec. 1290. Larceny defined. A person, who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof,

"Steals such property, and is guilty of larceny.

"Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt or for conspiracy to commit the same, or for being accessory thereto, that the purpose for which the owner was induced by color or aid of fraudulent or false representation or pretense, or for any false token or writing, to part with his property or the possession thereof was illegal, immoral or unworthy."

It is not pretended that the acts referred to constitute common law larceny, or come within the meaning of subdivision 1 of the section just quoted. Such a charge would have defeated itself for it is alleged that the money was contributed and delivered to the respondent; that it lawfully came into his possession; and that whatever wrong he did, so far as it relates to the money or checks, was committed after he had lawfully acquired possession of the money and checks.

There can be no common law larceny without a trespass and a wrongful asportation. There can be no trespass where possession has been given to the person charged with the commission of the

crime by the original owner of the property claimed to have been stolen. As Bishop well says in 2 Bishop's Criminal Law, fifth edition, section 111:

> "There can be no trespass where there is a consent to the taking. Suppose the consent is obtained by fraud, when, as already explained, the owner means to part with his property absolutely, and not merely with the temporary possession of it, the result is the same; for by reason of the consent, there is still no trespass, therefore no larceny."

The impeachment managers are therefore driven to the position that the respondent having lawfully received possession, custody and control of the money and checks claimed to have been stolen, committed what is known at the common law as embezzlement, that crime being defined by subdivision 2 of section 1290 of the Penal Law.

In order to lay the basis for this contention, it is alleged that the money was received "as bailee, agent or trustee." It is not stated whose bailee, agent or trustee the respondent is claimed to have been. It is to be inferred that the pleader sought to indicate that he was the bailee, agent or trustee of the persons named in the article as donors of the money and checks claimed to have been stolen. So far as these persons are concerned, and the same is true of all other donors of checks and money to the respondent who have been called, each of them shows that when he gave the check or money in question he did so unreservedly, without any agreement, statement or understanding that the money or check given, or any part of it, was ever to be repaid. There was an absolute parting with the title to the money or check delivered. None of these witnesses claimed nor is it alleged that any of them ever demanded the return of his donation or any part of it. None of them has made complaint with respect to the manner in which his donation was used.

Mr. Schiff testified that "When I used the expression 'campaign funds,' it was a very general expression. I certainly had no objection whatsoever, and I think it was the general intent and purpose of the conversation, that Governor Sulzer could use this $2,500 for whatever he would please." At page 491 he testifies:

"If I searched my mind, I would say to you that Governor Sulzer could have had this $2,500 at any time and for any purpose, and if I had been very careful I would not probably have used the words 'campaign expenses' because I really meant he should have the free use of it.

"Q. Did you intend, Mr. Schiff, that he might use it for any purpose whatsoever? A. Yes, for any legitimate purpose."

On being recalled, he confirmed all that he had previously stated, indicating that it was his intention to part absolutely with the money given by him.

Mr. Morgenthau testified:

"Q. Mr. Morgenthau, how long have you known Governor Sulzer? A. Oh, for many, many years; possibly twenty.

"Q. You knew him well and intimately? A. Yes; I knew him well.

"Q. And your relations were of a friendly character? A. They were.

"Q. Was there anything said in the conversation that you have related as to the use to which he was to put the thousand dollars? A. There was nothing said.

"Q. Did you in any way intend to limit him as to the use that he was to make of the thousand dollars? A. I did not."

Judge Conlon, who represented a group of donors, testified that he had a conversation with Mr. Potter in the Manhattan Club:

"We were speaking generally about politics. They were quite warm at that time and I told him that I did not believe Sulzer had a cent, or words to that effect, and that I intended to give him a contribution and that I thought it would be graceful on the part of his friends to contribute something to help him out; Mr. Potter said he entirely agreed with me and that he would give his check.

"Q. Many other of these contributions you obtained were obtained at the Manhattan Club, were they not? A. They were all.

"Q. And did you talk to them? A. Yes.

"Q. About his impecunious condition? A. I talked with several in the club; it was a matter of common conversation.

"Q. I mean as to his financial condition? A. As to his financial condition.

"Q. And the necessity of doing something to help him out? A. Yes; I was anxious to get money; I believed he needed it.

"Q. In other words, he was to use this money that you brought him for his personal purposes, clothing, hat, anything that he might want to spend it for? A. I said yesterday that I put no restriction upon it."

Daniel M. Brady told the Governor, in substance, that he was to use the money for his personal purposes, anything he might want to spend it for.

Richard Croker, Jr., told Mr. Sulzer he would like to help him to the extent of giving him $2,000 towards covering his personal expenses. He said: "At last I said to him that I wished he would consider the giving of this money as a personal and confidential matter. I intended he should use it for any personal expenses in connection with the campaign or in connection with anything."

Doctor Cox testified: "I gave this check to Mr. Sulzer for his personal use."

John Delahanty said: "I told him that I brought something to help him or to help him out. I did not limit the use of it in any way nor did I attempt to direct him what he should do with it. I told him, in substance, that he was to use the money that I brought him for his personal purposes, anything that he might want to spend it for."

Mr. Garber enclosed a check with a letter in which he said: "I congratulate you upon your nomination. I herewith enclose check for $100."

Mr. Mandelbaum testified that he brought the Governor a check for $200, and said: "I did not tell him what it was for. I did not say anything to Sarecky except it was $200 George W. Neville requested me to hand to Mr. Sulzer."

John F. O'Brien sent a check in a letter in which he stated: "I enclose herewith my check for $50 as a contribution."

Frank M. Patterson testified that he gave the respondent a check for $500 and said: "I had told Sulzer prior to this time that I was very much interested in his campaign and that I would give him a personal contribution in addition to those which I gave the regular committees, as was my custom. I did not place any limit or restrictions upon the use of this money. This contribution I considered as a personal one and not as a political contribution. He could do what he pleased with it."

Cornelius C. Pinckney, whose testimony is contradicted and lacking probability, testified: "I asked Sulzer whether he was in need of any money, and he said that he had no objection to taking it; in fact, he would like to have contributions as long as the persons who gave it to him felt as though they could afford it," and then he adds that Mr. Sulzer immediately said: "This was not to be considered a contribution which was to be accounted for."

John S. Sorenson, representing the firm of Crossman & Sielcken, delivered to the respondent $2,500, and all he said was: "I have been sent by Mr. George W. Crossman to hand you this."

Mr. Dooling testified that he made his contribution as the result of a conversation with a friend of the respondent who spoke to him relative to his financial condition.

Mr. Bernard said he gave this money as a personal contribution to Mr. Sulzer. Mr. Gwathmey and others testified that their contributions were purely personal.

While some of the witnesses stated that their contributions were in connection with the campaign, and probably would not have been made to him but for the fact that the campaign was in progress, there is not even a suggestion on the part of any of these witnesses that the money was paid to the respondent in a fiduciary capacity or that the relation of principal and agent was created between them. It is not pretended but that the money was paid to the individual for whose benefit it was intended to be given. At the most, there was a hope, expectation or desire that the money was to be used in connection with the campaign. Nobody, however, wished the money to be wasted or expended uselessly, or

employed for illegal purposes, and none of the donors had the remotest idea that he was to receive back a dollar of the money which he gave. Nobody has ever had such an idea when making political contributions. If it should now be decided that there is a right to get back any of the money paid to a candidate during the course of a political campaign, I will find that I have unsuspected assets.

In the past twenty-five years millions of dollars have been given by friends and admirers of candidates for political office, and it is believed that in all that time no donor of money so given has ever received back, or expected that he would receive back, a single dollar. The money is given in a spirit of liberality, of amity, of expansiveness, due to the excitement of the hour, unreservedly, and with the purpose of parting with it forever.

There is, therefore, in this case no basis for a charge of embezzlement. That crime, as well as larceny, is a crime against property. It is an invasion upon the right of ownership. It is therefore a sine qua non that the property claimed to have been stolen belonged legally to a person other than the accused. An indictment in such a case must plead the title of the person whose property is claimed to have been embezzled, and the prosecution must prove that the legal title to the property embezzled was in the individual who is charged to have been its owner. Who can say in the present case that the title to the moneys given to the respondent remained in the donors for any purpose?

Could Mr. Schiff or Mr. Morgenthau be heard to assert that they continued to be the legal owners of this fund, or that their right of property to the moneys given by them to the respondent had been invaded within the meaning of the criminal law? They admitted that it was their intention to part absolutely with the title to the money which they gave. That is absolutely conclusive upon the principle which underlies the criminal law, relating to crimes against property, volenti non fit injuria.

The subject of intent in this connection is admirably discussed in 1 Wigmore on Evidence, section 581, and is sustained by a multitude of decisions covering cases of fraud, of usury and of assaults of various kinds. Seymour v. Wilson, 14 N. Y. 567; McKown v. Hunter, 30 N. Y. 624; Thurston v. Cornell, 38 N. Y.

281; Cortland County v. Herkimer County, 44 N. Y. 22; People v. Kerrains, 60 N. Y. 221; Filkins v. People, 69 N. Y. 106, 107, People v. Flack, 125 N. Y. 335; Davis v. Marvin, 160 N. Y. 267; People v. Moore, 37 Hun 94.

Even if it were conceded for the sake of the argument that some of these moneys were given on condition that they were to be used for campaign purposes and for no other purpose, and that they were to be repaid if not so used — a most violent and unnatural and artificial presumption — certainly the possession of these funds by the respondent was lawful. The most that the donors could claim, if any claim they should make, would be that the respondent had a defeasible title to the moneys which he received. In the absence of a demand that the money should be returned, his possession would continue to be lawful and the crime of embezzlement would not be established. There is not the shadow of a pretence that anybody ever made any demand upon the respondent for any part of this money, nor is there anything to indicate that if any demand had been made, the respondent would not have been ready and willing to repay the amount demanded. In fact, it has been shown that Mr. Schiff was unwilling to receive back the money which had been contributed by him, or any part of it.

It is a well-established rule, not only in the criminal law, but on the civil side of the courts, that where one acquires possession of property lawfully, to change the character of the possession to a tortious one, a demand and a refusal are necessary. I cite many cases upon that subject which are familiar to the members of the Court of Appeals and to the lawyers who constitute a part of this body. Addison on Torts, 312; Colebrook v. Wight, 24 Wendell 169; Mont v. Derick, 5 Hill 453; Hence v. Van Dyke, 6 Hill 613; Goodwin v. Wertheimer, 99 N. Y. 146.

In the recent case of MacDonnell v. Buffalo Loan, Trust & Safe Deposit Company, 193 N. Y. 101, Judge Werner said:

> "The rule that one who comes lawfully into the possession of property cannot be charged with the conversion thereof until after a demand and refusal is too well established to justify extended discussion." Citing Goodwin v. Wertheimer, supra; Converse v. Sickles, 146 N. Y. 200; Castle v. Corn

Exchange Bank, 148 N. Y. 122; Tompkins v. Fonda Glove L. Co., 188 N. Y. 261.

But we are not required to stop our investigation at this point because not only is it necessary for the prosecution to show an invasion of the property right of a third party by the respondent, but it is also essential that it be shown that the relation existing between the respondent and those whose money is claimed to have been stolen, was that of bailee, agent or trustee. That is not only the precise language of the statute under which this article purports to have been framed, but it has always been the law. In 15 Cyc. of Law and Practice, 492, it is said:

> "One cannot commit embezzlement of money or other property lawfully his own, or in which he has a general interest."

Certainly the respondent had a general interest in this money. At page 494 it is said:

> "In order to constitute embezzlement, the accused must occupy a designated fiduciary relation, and the money or property must belong to his principal or come to the possession of the accused by reason of such employment.
>
> "The fraudulent conversion of money paid by mistake is not embezzlement." Commonwealth v. Hayes, 14 Gray 62; People v. Butts, 128 Mich. 208.
>
> "Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity; nor where the relation of debtor and creditor subsists between the parties." Smith v. Glendenning, 194 Pa. 45.
>
> "Possession must be by reason of some special trust imposed." Colip v. State, 153 Ind. 584.
>
> "The trust relationship must exist at the time of the reception of the money by the agent or the money must have been under the care of the agent by virtue of that agency, in order to constitute the offense of embezzlement." Taylor v. State 29 Tex. 466, 501; citing Wharton's Criminal Law, 9th ed., sec. 1055, where it is stated: "The term 'bailee' when

used in embezzlement statutes, is not to be understood in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer or to deliver, and who receive the goods first *bona fide* and then fraudulently convert."

Let us now consider the record for the purpose of ascertaining whether the respondent received the moneys in question as the agent of anybody else. What were the terms of the agency? What were the limitations? Who was to determine what use was to be made of the money? Was the agency of Mr. Schiff a different agency from that of Mr. Elkus, or Mr. Morgenthau, or Mr. Dooling, or Mr. Ryan? Was the money of each of these donors to be kept separate? We are without light upon that subject. The alleged principals do not complain. They are absolutely satisfied. So far as the record indicates, every one of them came here under compulsion. None of them has voiced dissatisfaction with the action of the respondent. It is the strangest case of agency that has ever come under the observation of anyone who has the slightest familiarity with the legal concept which is so denominated.

We are in the same plight with regard to the idea of a bailment, as applicable to the present case. Which of the bailments described by Lord Holt in Coggs v. Bernard is this claimed to be? It has none of the elements of a depositum, a mandatum, a commodatum, a pignus or a locatio. The respondent was not called upon to deliver this fund to anybody, to receive it on deposit, it was not pledged to him, he was not acting as a common carrier, nor was he to perform any service in connection with it. There was no basis for even an action of tort based on any failure to return the money, or any part of it, or by reason of the use that the respondent actually made of it.

The impeachment managers are, therefore, compelled to fall back on the generalization that the respondent was a trustee, a fiduciary, and therefore, by reason of a breach of trust, has been guilty of larceny. This calls for an interpretation of the meaning of the term "trust." A trust is a right of property, real or

personal, held by one party for the benefit of another. Burnett v. Bookstaver, 10 Hun 484; Gifford v. Rising, 51 Hun 1.

It is the relation between two persons by virtue of which one of them, called the trustee, holds the property for the benefit of another, called the cestui que trust. Corby v. Corby, 85 Mo. 371, 378.

In its simplest elements, a trust is a confidence reposed in the trustee for the benefit of the cestui que trust with respect to property held by the former for the benefit of the latter. It implies two estates or interests, one equitable and one legal, and is said to exist where property is conferred upon and accepted by one person on terms of holding, using or disposing of it for the benefit of another. Corby v. Corby, 85 Mo. 371, 378; 30 Cyc. of Law & Practice, Title "Trust," p. 18.

As it has been elsewhere expressed, a trustee is a person who takes and holds the legal title to the trust property for the benefit of another. Dillenbeck v. Pennel, 121 Iowa 203; Glengarry Consolidated Mining Co. v. Boehmer, 28 Col. 1; Welles v. Larabee, 36 Fed. Rep. 266; Taylor v. Mayor, 110 U. S. 310, 335; Black's Law Dictionary and Bouvier's Law Dictionary.

Every statement which I have here made is abundantly supported by authority.

How completely the house of cards erected by the impeachment managers disappears before these definitions. The very idea that the respondent received or held these moneys for the benefit of any other person than himself savors of humor.

What was the nature of the benefit which the cestuis que trust, supposedly the creators of the trust, the donors, were to have? There is no pretense that even by mental reservation, they, or any of them, were to be the beneficiaries. Nor is there the slightest suggestion that any third party was to be the beneficiary. The donations were purely personal, they were not to be used or expended for the benefit of any third party. In other words, if the respondent was the trustee, he was likewise intended to be the beneficiary. If the trust was that the money should be used for campaign purposes, it was to be the respondent's campaign purposes, and not those of any other person, and the entire benefits of the alleged trust fund were to be those accruing to the respond-

ent. To dignify this relation by the term of trust is to add a new abuse to that oft misunderstood creation of the law.

But even if, by any stretch of the imagination, it were possible to deduce from the facts established the germ of a trust, it was withered at its very birth, for nothing is clearer than that the same person cannot be trustee and beneficiary. The equitable estate of the beneficiary is merged in the legal estate, and ceases when the legal title is absolutely vested in the trustee. Woodward v. James, 115 N. Y. 346; Greene v. Greene, 125 N. Y. 506; Woodbridge v. Bockes, 170 N. Y. 596; Weeks v. Frankel, 197 N. Y. 304.

In Greene v. Greene, 125 N. Y., Judge Gray said:

> "The trustee and beneficiary must be distinct personalities; for otherwise there can be no trust, and the merger of interests in the same person would effect a legal estate in him of the same duration as the beneficial interest designed. . . . that the legal and beneficial estates can exist and be maintained separately in the same person is an inconceivable proposition. It is quite as much of an impossibility legally considered, as it is physically."

And in Weeks v. Frankel, 197 N. Y., Judge Haight said:

> "A trust contemplates the holding of property by one for the benefit of another, and consequently the same person may not at the same time be sole trustee and sole beneficiary of the same interest."

But we are not obliged to rest our contention even at this point where demonstration has performed its office most effectually. For whatever the form of larceny charged against the respondent himself, the crime cannot be established unless it is shown that the accused acted with a criminal intent, that he took or withheld from the true owner of the moneys given to him, the possession thereof *animo furandi*, with the intention of stealing.

If this were not the most solemn proceeding conceivable, the charging of an intent to steal under these circumstances would attain the Himalayan heights of the ridiculous.

It will suffice for the purposes of this case to permit this honorable Court to draw a parallel between it and People ex rel. Perkins v. Moss, 187 N. Y. 410, with which Mr. Jerome was most familiar. The present case is infinitely stronger for the accused than was that which I have just cited, and because of the conclusion which the Court of Appeals, including the dissenting judges, reached in that case, I venture to quote at length from the opinions there delivered.

Judge Gray said (pp. 419, 420):

> "It is apparent that what constitutes the crime of taking the property of another for the use of the taker, or that of any other person than the legal owner, is the intention with which the act is committed. Under the statute, the crime of larceny no longer necessitates a trespass; but it does need, as an essential element that the 'intent to deprive or defraud' the owner of his property, or of its use, shall exist. The intent, by necessary implication, as from its place in the penal statute must be felonious; that is to say, an intent without an honest claim or right. It is not now essential, as it was under the Roman and early English law, that the intention of the taker shall be to reap any advantage from the taking, the statute makes the crime to consist in the intent to despoil the owner of his property. That is necessary to complete the offense, and if a man, under the honest impression that he has a right to the property, takes it, it is not larceny, if there be a colorable title. (See Code Crim. Pro., sec. 548; People v. Grim, 3 N. Y. Cr. Rep. 317; Bishop's Crim. Law, secs. 297, 851; Wharton's Crim. Law, secs. 883, 884.) The charge of stealing property is only established by establishing felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act which distinguished the criminal trespass from a mere civil injury. (1 Hale's P. C. 509; McCourt v. People, 64 N. Y. 583.) Doubtless, if the particular act was specified in the penal statute, an honest belief that it was right, while it would purge the act from immorality, would not relieve it from indictability. . . . If we turn then, to a consideration of the fact upon which the magistrate ordered the relator

to be arrested, it is impossible, reasonably speaking, to find that criminal element which the statute makes a necessary one, the intent of the accused to steal. . . . Courts, however, may not sit to judge the conduct of a defendant by any moral code, or rules of ethics. Their sphere is to ascertain if the facts shown establish the crime charged against him. In the facts stated in these depositions, I find none upon which criminality can be predicated. The essential element of the 'intent to deprive and defraud' is nowhere to be found, and there is no just basis for the inference. There was no concealment about the transaction and knowledge of it was conveyed to the other trustees. That the relator may have made a mistake of law, which will not relieve him from liability in a civil action, may be true, and he expressly disclaimed in his letter any intention to dispute such a liability, but this was a case where the intent or good faith was in issue, and then knowledge of the law is immaterial. (Knowles v. City of N. Y., 176 N. Y. at p. 439; Goodspeed v. Ithaca St. Ry. Co., 184 Id. at 354.) The relator came to the aid of the president of the company, who, as such, had agreed to contribute moneys to the campaign fund, and advanced the moneys, temporarily. Having done so, for no other reason than for the supposed advantage of the company, his claim to be reimbursed from the treasury of the company is openly presented, and it is paid. But within the spirit, if not the letter, of section 548 of the Penal Code, that was not larceny. The section provides that 'Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable.' This section is an expression of the emphasis which the statute lays upon the intent with which the property of another is taken. It is a qualification of the provisions of section 528 of the Penal Code, defining what shall constitute the crime of larceny. It is of considerable significance, as illustrating the legislative understanding, that when in 1906 the Legislature dealt with the question, specifically, the offense was declared to be a misdemeanor, not a larceny."

His Honor Judge Hiscock said (pp. 425, 426):

"It is agreed upon all sides that the crime of larceny may not be committed unintentionally, unconsciously or by mistake, but that in order to accomplish it the perpetrator must have the intent referred to. It may be difficult at all times exactly and satisfactorily to define this intent, but the requirement for it, as applicable to this case, means that when the relator took part in the appropriation of the moneys in question, he must have had in some degree that same conscious, unlawful and wicked purpose to disregard and violate the property rights of another, which the ordinary burglar has when he breaks into a house at night with the preconceived design of stealing the property of its inmates. There is, as there ought to be in the absence of statutory enactment, a long distance between the act which is unauthorized and illegal, and which subjects the trespasser to civil liability, and the one which is legally wicked and criminal, and which subjects the offender to imprisonment. It is on this point of criminal intent that I think the district attorney has failed to furnish any evidence whatever on which the magistrate might act, although the burden affirmatively rested on him so to do. . . . If, in a suit upon a note the plaintiff relies for evidence upon the statement of the defendant that he gave the note, he must also accept the accompanying declaration that the note has been paid in full, and if this is all the evidence, the statement stands as a whole, and the proofs fail. . . ."

"In McCourt v. People, 64 N. Y. 583, the plaintiff in error stopped at a house and asked the daughter of the owner for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, and although forbidden to do so by her, went in and drew some cider. He was indicted for burglary and larceny, and it was held that the trial court committed error in refusing to direct his acquittal. It was said: 'Every taking by one person of the personal property of another, without his consent, is not larceny; and this, although it was taken without right or claim of right, and for the pur-

pose of appropriating it to the use of the taker. Superadded to this there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be a crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury.' And then, further, as applicable to the particular circumstances of that case, 'there was not only an absence of the usual indicia of a felonious taking, but all of the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence, and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the earmarks which ordinarily attend and characterize it.'"

His Honor, Chief Judge Cullen, delivered the dissenting opinion, but notwithstanding, recognizes the principles which we are contending for, for he says (pp. 439, 442):

"But though there was an illegal misappropriation of the corporate funds by the relator, this does not necessarily prove that he was guilty of larceny. It may have been simply a trespass for which he is only civilly liable. I agree with Judge Gray that to constitute larceny there must be what is termed a felonious intent, but we do not make progress towards the determination of the question before us unless we ascertain what is a felonious intent. The question has given rise to much discussion in textbooks and in judicial opinions. Whether 'intent' is the proper term to employ may well be gathered. Though a man may commit many statutory offenses unwittingly, no one can become a thief or embezzler accidentally or by mistake. To constitute the offense there must be in the perpetrator the consciousness of the dishonesty of the act. This, however, as frequently turns on the knowledge or belief of the party as to his authority as on his intent regarding the disposition of the property.
* * *

"It may be in the present case that the relator's character is so good, and his standing so high, that either on the examination or on the trial, it will seem clear that he could not have consciously and knowingly misappropriated the money of the company. It is also but fair to the memory of the president, who is now deceased, to say that it is entirely possible that his standing and character may appear to have been equally as good. The relator is entitled to the full benefit of the presumption arising from such character when presented at the proper place and before the proper tribunal. But, of course, nothing of that nature appears or can appear in the depositions on which the warrants were issued. However high the standing and character of the relator may be, it does not justify a departure in his case from the same orderly course of procedure in the administration of justice which would be followed in the case of the humblest citizen charged with an offense."

In other words, that that question was a question to be tried at the final hearing.

And Judge Werner, who also dissented, said (p. 445):

"If the question were whether the relator's guilt of the crime of larceny, as charged in the information, had been established according to the immemorial rule which obtains in criminal trials, and which imperatively demands proof of guilt beyond a reasonable doubt to justify a conviction, I should unhesitatingly vote in the negative, for the evidence which the magistrate had before him when he was called upon to issue the warrant concededly falls far short of that standard. But that is not the question before us. The only question we are called upon to consider, and indeed the only one we have the right now to decide, is whether the evidence before the magistrate invested him with jurisdiction to issue the warrant."

But now we have before us the question which is so well stated in the opinion of Judge Werner. What, on the evidence, what on the proofs, is the conclusion here to be reached in accordance

with this immemorial rule of requiring proof of guilt beyond a reasonable doubt, as to which in that case the learned judge said that at the final stage of the case he would be compelled unhesitatingly to vote against the existence of guilt?

Whatever may be said by way of personal reflection, vituperation or condemnation of the respondent in connection with the receipt of these moneys, to say that he intended to steal them, that to the remotest extent he harbored a criminal thought, is to do violence to one's credulity. Reason, experience, justice and fair play stand aghast at the very suggestion of such a possibility.

It is well known that some of the greatest men in American history, who devoted their lives to politics in the best sense of that much abused term, were proverbially impecunious, in a state of perennial financial distress, and dependent largely upon gifts, loans and contributions from their friends and acquaintenances, and those who believed in them.

Charles James Fox and Richard Brinsley Sheridan are famous examples in English history. Daniel Webster and President McKinley are but two of many examples that may be cited from American history. One might as well charge that the god-like Daniel was guilty of larceny because he scattered with spendthrift lavishness funds which his admirers, seeking to help him in his career, may have placed in his possession.

That Governor Sulzer had such admirers, men like Mr. Schiff, Mr. Morgenthau, Mr. Lehman, Dr. Cox, Judge Conlon, and others who have here testified, is established beyond a peradventure, and to intimate that the respondent, when he used the moneys which he received from any or all of these men, for his personal uses, did so with a criminal intent, is as cruel as it is ungenerous. Nothing but blind prejudice, uncontrolled passion and the most bitter hatred, can deduce criminal and larcenous intent from any of the acts charged against the Governor of the State of New York, a man who for twenty-five years was universally regarded as a faithful, useful and patriotic public servant.

We have now dealt with the charges which have been declared to be the very head and front of the respondent's offending. Upon analysis they vanish into thin air. They have no

basis in law or in fact. They are not even charges of misconduct in office. On a trial before a regular tribunal administering the criminal law, they would present no question to be passed on by a jury. This tribunal, however, is one which performs the double function of a trier of the law and a trier of the facts. In their determination William Sulzer, the Governor of the State of New York, is not so much on trial, as is the law itself. May it never be understood that in order to punish him, violence is to be done to the majesty of law and a stain imposed upon the pure garments of justice.

As collateral to the charges contained in articles 1, 2 and 6, are those set forth in articles 3, 4 and 5. The latter are founded on the former and are a mere outgrowth from them, a parasite, as it were. Yet, while it is believed that with the disposition of the primary charges, the secondary charges would be likewise disposed of, in view of the position taken by the impeachment managers with regard to these three charges, although they have been fully dealt with in the opening remarks of Senator Hinman, we will permit ourselves to advert to them further in order to demonstrate the weakness of the case of the prosecution and the unfair methods to which resort has been had in order to create an atmosphere of suspicion and prejudice about this case.

None of the acts charged in the articles now under discussion were official acts. None of them relate to any matter as to which the respondent was called upon to perform any official duty. They are all claimed to have been of a private and personal nature. They bear no relation to the performance of executive functions and I may therefore well urge that none of these acts comes within the letter or the spirit of section 12 of the Code of Criminal Procedure, which, as has been seen, defines the jurisdiction of this tribunal.

It certainly cannot be the law that the Governor may be impeached for violating any provision of the criminal law whether it be a misdemeanor, a felony or a violation of an ordinance. Otherwise he might be haled before this great tribunal on charges of impeachment alleging that he ran an automobile faster than 20 miles an hour. There must be some relation between the act charged and wilful and corrupt misconduct in office in the per-

formance of his executive functions. It is not sufficient that they are the wrongful, or even the criminal, acts of an individual who happens to hold a public office.

But we will not rest here, preferring to deal with the merits of these charges as we have regarded those which have already passed under review, considering each of them separately in the order in which they are stated.

Article 3 charges the respondent with "mal and corrupt conduct" in his office (not wilful and corrupt misconduct in office), and bribing witnesses in violation of section 2440 of the Penal Law. It is stated that a committee was appointed by concurrent resolution of the Legislature to investigate into, ascertain and report at an extraordinary session of the Legislature upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by and on behalf of any such candidate for moneys or things of value received or paid out in aid of his election, and their compliance with the requirements of law relative thereto; that while such committee was conducting its investigation the respondent in July and August, 1913, "fraudulently induced one Louis A. Sarecky, one Frederick L. Colwell and one Melville B. Fuller, each to withhold true testimony from the said committee," and which under said inducements of the respondent they and each of them refused to do; that in performing these acts the respondent acted wrongfully, wilfully and corruptly and was guilty of a felony.

Section 2440, under which this article purports to have been drawn, reads as follows:

> "A person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony or to withhold true testimony, is guilty of a felony."

This article is very indefinite. It consists of the merest conclusions. It charges the respondent with bribing witnesses without

stating which of the persons named in the article was bribed, or how he was bribed.

It is further alleged that the respondent fraudulently induced them to withhold true testimony from the committee. It does not state what fraudulent means were used. It does not indicate what the testimony was that was withheld. It is a generalization and nothing more, and gives no notice of the true charge which the respondent is to meet with respect to the three individuals named in the article. The crime charged being a felony is subject to the same principles so far as intent is concerned which are applicable to the charges of perjury and larceny with which we have thus far dealt.

The article refers to bribing witnesses without stating how the witnesses were bribed. It then proceeds to say that he fraudulently induced Sarecky, Colwell and Fuller to withhold testimony. Under the statutory definition, the offense described in section 2440 of the Penal Law has to be committed by means of a bribe or an attempt by other means fraudulently to induce to withhold true testimony. These other means must exclude the idea of bribery. What they are is not stated.

But without dealing with this charge according to the strict rules of pleading which obtain in criminal proceedings, let us consider the evidence for the purpose of ascertaining whether there is any reasonable foundation for the charge with respect to either of the three individuals named.

One of the persons mentioned is Melville B. Fuller. Is there a scintilla of evidence to indicate that he was bribed or that any fraudulent means were adopted to induce him to withhold testimony from the Frawley committee? He appeared before this Court and testified fully, freely and frankly in a manner which carried conviction to everyone who heard him. He was a man who showed himself jealous of his honor and of his integrity and his reputation. He brought with him all books and papers. He attended before the impeachment managers, out of Court, when he was not bound to do so, and disclosed to them his private books. He showed himself to be a high-minded gentleman, anxious to do naught which savored of unfairness, discrimination or favoritism.

When he first appeared before the Frawley committee, acting on the belief which is shared by all stock brokers and bankers, that the business of their clients is privileged and that they are not bound to disclose it without the client's consent, he declined of his own accord to answer the questions. He came to Albany, stated the situation to the respondent, who incidentally informed him that he had been advised that the committee had no power to carry on its investigations. The respondent made no suggestion of anything which savored of an intimation that Mr. Fuller should refuse to testify, and later, Mr. Fuller in fact, with the affirmative consent of Governor Sulzer, testified before the Frawley committee fully and completely with regard to all the transactions between the respondent and Harris & Fuller.

At that time, it appears from the record, page 893, Judge Olcott, who was the personal counsel of Mr. Fuller, appeared with him before the Frawley committee and said — this has already been read to this Court, but nevertheless, in view of the nature of the charge which has been made, and which has not been withdrawn, which still is before this Court for determination, I feel that I should again call attention to what took place, as an indication of the manner in which these prosecutors are conducting this case —

> "I was not present at the hearing before. Before you proceed with his examination, through your own already expressed courtesy of the commission and that of Mr. Richards, I want to say a word on the subject of his refusal to answer questions the other day, and the fact that he now presents himself ready to answer all questions which are asked. His refusal the other day was based upon the custom, which is to them a law and a moral right of brokers, never to reveal any of their books so far as their customers' accounts are concerned. Since that, we have had a conference with Governor Sulzer and his representatives, and the Governor agrees that without further contest, without any contest on his part, that Mr. Fuller's lips should be unsealed. Now, having that waiver from the customer, Mr. Fuller feels at liberty to answer your questions. I thank you for the privilege of this statement of his position in the matter."

Thereupon Mr. Fuller presented to the Frawley committee every book, paper and document that it desired. Some of them were examined by the committee at that time, as fully as it wished. The witness answered fully and frankly all questions put to him, and furnished them with a transcript of the account of Governor Sulzer.

If it is possible to spell from this testimony any bribery or attempted bribery, or any other fraudulent means to induce the witness to withhold testimony, then, like Alice in Wonderland, we are groping amid the obfuscations of topsy-turvydom.

And yet for some mysterious reason this witness was subjected to the most extraordinary treatment. The book which he produced was passed from one member of this Court to another with all the theatrical concomitants of the melodrama except slow music. It was intimated that the books had been "doctored," fraudulently altered and forged. Mr. Fuller thereupon demanded the right and the privilege of protecting his reputation and his character against these insinuations and innuendoes and stated that he had concealed nothing and had nothing to conceal, that his books were absolutely correct, that no balances had been forced, that there had been nothing omitted or concealed to protect Governor Sulzer or anyone else and indicated his perfect willingness to bring his books into Court, and to produce every clerk in his office, to prove the correctness of his statement.

It was a pathetic scene of a man striving and struggling before this High Court to maintain his dignity and his honor in the eyes of the people of the State.

Two days later the impeachment managers were forced to absolve Mr. Fuller from the unworthy suspicions for which they were responsible. We may therefore discharge from further consideration any suggestion of wrongdoing with respect to the testimony of Mr. Fuller.

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Mr. Marshall.— Continuing the discussion of article 3 of the impeachment articles, I now come to a consideration of the charge with regard to another of the persons named in the article, Frederick L. Colwell. There is absolutely no evidence in the record of any conversation, communication — oral or written — between the respondent and Colwell with respect to the giving or with holding of any testimony from the Frawley committee, or as

to his testifying or not testifying before that committee. The only evidence in the record relating to Colwell is that he gave orders for the purchase of stock and paid for stock to the firm of Harris & Fuller and Boyer, Griswold & Company.

The witness John Boyd Gray testified that Colwell lived at Yonkers in a house rented from him; that he last saw him at 71 Broadway about the middle of August; that at that time Colwell said to him that he was going to Albany; that he did not say how long he was going to remain away; that he had called up his house and asked to have his luggage brought to the Yonkers station; that he took a northbound train; and that he said he was going to see William Sulzer. There is absolutely no other testimony in the record with regard to Colwell, nothing even to show that he made any default in appearing before the committee, or that he had refused to yield obedience to any subpoena served upon him, or to answer any questions put to him. His statement to Gray that he was going to Albany to see William Sulzer is the merest hearsay and is not binding in any way on the respondent. To argue from this bare statement that the respondent bribed the witness or used any fraudulent means to induce the witness to withhold any testimony from the committee, is so far-fetched as not to merit being dignified by the term argument. It is a bald guess, a violent conjecture, and an ungrounded suspicion.

Inference and surmise are not permitted to take the part of proof, even in a civil proceeding. To hint at the possibility of employing them in a criminal proceeding is monstrous. The very fact that the prosecution is driven to such straits is the strongest evidence of the weakness of their position. Time was when prosecuting officers were considered as quasi-judicial, and when they felt it incumbent upon themselves to move for the dismissal of an indictment or of a prosecution where there was no legal evidence, or not sufficient evidence, to warrant the submission of a charge to the determination of the tribunal before which it was on trial.

We have fallen upon other days. Anything which may constitute the basis for a newspaper headline; an inflection of the voice, a lifting of the eyebrow, a shrug of the shoulder, a confidential whisper, seems to be a sufficient instrumentality for the destruction of a reputation and the ruin of an honorable career. This was the

method pursued by Iago for the purpose of arousing the jealousy of the credulous Othello, which led the poet to exclaim, "Trifles light as air are to the jealous confirmation strong as proof of holy writ." It is the method pursued by the slanderer and the backbiter, and which, if indulged, will subject any member of the body politic, and especially every holder of public office, to unspeakable perils. Rumor with her thousand tongues is ever ready for mischief and he is indeed a fortunate man whom a kindly fate has spared from her withering blasts.

An entire absence of testimony is now sought to be made the equivalent of the most cogent proof, and where the law requires proof beyond a reasonable doubt, the absence of a single legitimate fact upon which reason can operate is to be made a substitute for that rule which the wisdom of the past has evolved as a safeguard of the liberty of the citizen.

In this connection it will also be useful to remember, as reflecting upon the methods of the prosecution, that it was pretended, when Mr. Beall, his counsel, was on the witness stand, that the witness, John Boyd Gray, could not be found. Questions were put to him to indicate that the whereabouts of Mr. Gray were shrouded in mystery. Mr. Beall showed that Mr. Gray was daily at his office transacting business, that he had seen him there and talked with him there, and when Mr. Gray voluntarily came and testified, it appeared that he had not even been subpoenaed — he had not been requested to appear. The mere suggestion of the desire that he should be present was sufficient to induce him to come unsubpoenaed. That there was no attempt on the part of anybody to keep him away was shown by the answers to the questions put to the witness by Senator Brown:

"Q. Have you avoided the service of process for the purpose of avoiding an appearance here? A. No.

"Q. Have you been requested not to appear here if you could avoid it? A. I have not.

"Q. Have you had any communication from Governor Sulzer or any other person about not appearing? A. I have not.

"By Senator Pollock:

"Q. When did you first learn that your appearance in this Court was desired? A. Oh, I heard of it indirectly several days ago.

"Q. Through whom? A. Why, through several sources, I guess.

"Q. Did you receive any communication from the impeachment managers or their counsel? A. I did not."

The third witness referred to in this article is Louis A. Sarecky. It was shown that he appeared before the Frawley committee, and from the proceedings of that committee the prosecution read some of the questions and answers given by the witness, which merely showed that the witness under the circumstances described stated that he would not testify unless he was permitted to have counsel present in order to bring out all the facts on both sides and not to give a colored statement. And even then he showed clearly that he did not refuse and did not intend to refuse to testify.

I will briefly read from the record on that point and invite your Honors to examine the entire testimony which was introduced from the proceedings of the Frawley committee with regard to this witness. This part of the testimony was not offered by the prosecution. It was left to the respondent to bring it out. Mr. Sarecky testified as follows:

"A. Now, gentlemen, I want to make a statement on record before I testify further. If you are delving into the Governor's campaign expenses, I am willing to tell everything, on condition that I be represented by counsel, because if the story is to be told, I want both sides told."

Then the chairman interrupted him by saying:

"Mr. Sarecky, if Mr. Richards asks you any question that you feel you don't want to answer, you have a right to refuse."

Then the witness replied:

"I feel that the committee has absolutely no authority at all to conduct the investigation."

"I refuse to answer that question and all other questions pertaining to the Governor's campaign fund, unless I am permitted to be represented here by counsel, who will bring out the whole story and not one side of it, and he will give me full opportunity to explain any items that may appear doubtful on the face of it."

That was his testimony, and that was the position which he assumed, which was not the position that he would refuse to answer. He merely asked that he should have counsel, that there should be an opportunity for counsel to be present, and he was told by the chairman of the committee that if he did not want to answer the questions he had the right to refuse to answer.

The testimony in regard to his refusal to testify before that committee, given by him on his examination before this Court, is fresh in the minds of its members, and because of the limited time given us for argument, I shall not stop to read it. I am obliged to hurry on.

But I suggest that there is nothing in that record which does not indicate that Sarecky was entirely willing to testify. There was no attempt made by anybody and no intention of anybody to interfere with his testifying, and the respondent here did in no manner interfere or try to interfere with him, or try to induce him not to testify.

There is absolutely nothing to indicate that Sarecky's refusal to testify was based on any instruction, advice or action of the respondent. In fact, the witness expressed his willingness and his desire to answer all questions. All that he asked was that he should have the privilege of being represented by counsel so that the entire story might be given without discoloration, and he might have an opportunity to explain everything. In fact, the chairman of the committee informed the witness that if the counsel to the committee asked him any question which he felt he did not wish to answer, he had a right to refuse.

Those who are familiar with the methods of investigating committees will recognize that they are generally characterized by a disposition to bring out half truths only, to suppress facts, to prevent the telling of the whole story. That is true of most committees. I do not mean to say that it is always done with a wrongful intention; but it is the natural tendency of such bodies to be one-sided.

At all events, the witness did not intend to be understood as refusing to answer questions. He merely sought protection against being put in a false position and being required to give

a garbled and incomplete statement of facts. But it is a far cry between a witness' refusal to testify under the conditions stated and the criminal agency of the respondent to induce him to withhold true testimony from the committee.

No effort was ever made to call Sarecky a second time, either before the committee or before the Assembly, but it is claimed, nevertheless, that Governor Sulzer bribed Sarecky into a refusal to testify by procuring his appointment as a lay deputy in the bureau of deportation of the alien insane.

If the respondent bribed this witness, this amounts to a charge not only that he was a briber, but that Sarecky was bribed. This is certainly a most serious charge. It is not to be dealt with lightly. Strong and incontrovertible testimony is the least that should be required at the hands of the impeachment managers for its establishment. How has this burden been sustained?

It was asserted by their counsel that Sarecky had been appointed to be a deportation agent in place of a physician, and that this appointment constituted a bribe. It was shown that Sarecky had previously been confidential stenographer to the Governor. He had resigned as such on June 18, 1913. He had been in the Governor's employ for many years. He had indicated intelligence and competency, and it was but natural that the Governor should not interpose any obstacles to his advancement.

On July 23, 1913, the State Hospital Commission communicated with the State Civil Service Commission, requesting the latter to suspend the rule requiring examination in the case of Louis A. Sarecky for appointment to the position of lay deputy in the bureau of deportation, at an annual salary of $4,000. The Hospital Commission, in its communication, said:

> "Mr. Sarecky is a person of high attainments and possesses qualifications which will make him a useful member of the force. He masters five modern languages and also knows the jargon of the different races and nationalities contributing to our hospital population."

On the following day this communication was acknowledged.

On July 30th the State Hospital Commission presented another communication to the State Civil Service Commission

with respect to the position of lay deputy in the bureau of deportation, asking that it be classified in the exempt class under the civil service rules. It was stated that competitive or non-competitive examination was not practicable for filling the position, because an immediate appointment was necessary, and because of the extraordinary need of assistance in the bureau; that there was no eligible list from which such lay deputy could be appointed; that the Commission desired to appoint Louis A. Sarecky, who was familiar with the work of the bureau and had become specially equipped as an investigator in some of the difficult fields to which he would be assigned to work on the Hospital Commission, that peculiar and unusual qualifications of an educational character were required for the position, and that Sarecky was a linguist who commanded five modern languages and knew the jargon of the different races or nationalities contributing to the hospital population.

On July 30th, the Commission, subject to the approval of the Governor, placed in the exempt class the position of lay deputy, bureau of deportation. The State Civil Service Commission reported this action, and the Governor approved the action of the Commission, and thereupon, on July 18, 1913, the State Hospital Commission appointed Sarecky as a lay deputy, at a salary of $4,000 a year.

The State Hospital Commission consists of public officers of high standing. The State Civil Service Commission likewise consists of three public officers of unimpeached character. Both of these commissions cooperated in the official action which was taken. It is not to be presumed that any of these high officials violated his oath of office or acted otherwise than in accordance with his best judgment and for the best interest of the State. The responsibility for any appointment that was to be made rested on the Board of Hospital Commissioners. The responsibility for the enforcement, according to its true spirit, of the civil service law rested on the Civil Service Commission. It is not pretended that Governor Sulzer communicated with any one of these officials or used his influence with them in any way or urged them to do aught which they did not consider to be consonant with their public duties. The appointment was theirs.

The determination as to the fitness of Sarecky rested upon them and yet in spite of the legal presumption in favor of the honesty and propriety of official action, these public officers are practically charged with having entered into a conspiracy to enable the respondent, through their agency, to bribe Sarecky, their appointee. This is piling suspicion on suspicion's head, vaulting conjecture that overleaps itself.

But the unfairness of our opponents does not stop here. They have pretended that a physician was removed for the purpose of making a place for Sarecky, and the duties which he was called upon to perform were those of an expert medical character. This is not true. Section 7 of chapter 121 of the Laws of 1912, which amends the insanity law, provides:

> "There shall be established by the commission (the Commission in Lunacy) a bureau of deportation for the examination of insane, idiotic, imbecile and epileptic immigrants and alien and nonresident insane, and to attend to the deportation or removal thereof, which shall consist of a medical examiner and such number of medical or lay deputies as may be necessary, to be appointed by the commission."

The duties of these deportation agents were to see to it that such aliens who were found to be insane and who were to be deported from this State, were safely returned to their friends or relatives in the countries whence they had come. This requires medical men, in the first instance, to determine the fact of insanity, and laymen, in the second instance, to attend to the physical act of deportation. That requires men who are able to converse with the insane aliens, to make investigations as to their place of origin, to communicate with their relatives and friends, so that the poor unfortunates might not be set adrift without regard to what might be their fate; it requires a knowledge of languages and the possession of tact as well as a pleasing address, coupled with the ability to make investigations of the character indicated — these are the important qualities required for such a lay deputy.

That Sarecky possessed them to a high degree is not only indicated by his testimony but by the manner in which he has testified before this Court. Never has there been a civil service examina-

tion so searching, so painstaking, so thorough as that to which the witness was subjected at the hands of that master of the art of cross-examination, Mr. Stanchfield, and I leave it to this Court to determine whether that young man did or did not pass a satisfactory examination as to qualification, as to ability, linguistic and otherwise. He indicated that he possessed the linguistic qualifications necessary, and that he thoroughly understood the nature of the duties which devolved on him, and possessed the sympathy that was essential to the furtherance of the welfare of the charges whom he was obliged to attend.

There never was a criticism more unjust than that which has been directed against this very worthy and conscientious young man, whose whole life has been disclosed to you, who has been subjected to an examination in which the examiner, astute though he is, was unable to indicate the slightest rift in his armor. The public service of the State has profited by his accession to its ranks. How many are there among our public officials today who are his equal in intelligence? That does not, however, seem to exempt him from the charge of criminality. Whoever stands between those who are egging on this prosecution and the accomplishment of their fell purpose must be stricken down and the chariot of the avenger is driven over his prostrate form. Their artistic sense demands the creation of an atmosphere, mephitic or otherwise, and they have not spared pains to create it in court and out of court, in the corridors and in the lobbies and on the streets.

The prosecution studiously filled the air with whispers, which presently became translated into flaring headlines, that Sarecky had fled from the jurisdiction of this Court in order that he might not be compelled to become a witness on this trial. While these publications appeared Sarecky was engaged in the proper performance of his duties, either at his official post in Albany, in Buffalo, or in New York, wherever his duties called him. There has not been a moment when his whereabouts were not thoroughly known to his superior officers. No attempt whatever was made to conceal his presence, and at the very time when, with theatric effect, it was intimated that he could not be found, he was practically within the precincts of this Court.

So much for the charges of bribery, and of the use of fraudulent

means for the suppression of testimony! If the rules which apply to criminal proceedings are to receive the force to which they are here entitled, the charges contained in this article have woefully and dismally failed.

The fourth article charges the respondent with the misdemeanor of suppressing evidence, and of a violation of section 814 of the Penal Law of the State, in that the respondent "practiced deceit and fraud, and used threats and menaces with intent to prevent said committee and the people of the State of New York from procuring the attendance and testimony of certain witnesses, to wit, Louis A. Sarecky, Frederick L. Colwell and Melville B. Fuller, and all other persons, and with intent to prevent said persons named, and all other persons, severally, they or any of them having in their possession certain books, papers and other things which might or would be evidence in the proceedings before said (Frawley) committee, and to prevent such persons named and all other persons, they, severally, being cognizant of facts material to said investigation being had by said committee, from producing or disclosing the same, which said several witnesses named, and many others, failed and refused to do.

Section 814 of the Penal Law reads as follows:

> "A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper or other thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper or other thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor."

Here, again, the articles deal in mere generalities. There is no statement as to what deceit or fraud is claimed to have been practiced, what threats or menaces were employed, what books or papers were to be eloigned, what facts were to be concealed. So far as Sarecky, Colwell and Fuller are concerned, all of the evi-

dence relating to them has already been fully considered. It is difficult to conceive of any deceit or fraud which the respondent practiced upon these persons, or upon any person, to prevent them from testifying. The evidence positively shows that he did nothing whatever except to express his entire willingness that Fuller should testify, without qualification or reserve.

The case is entirely barren of even the suggestion that threats or menaces of any kind were employed to compass the suppression of testimony, or for any other purpose. The record is blank so far as this point is concerned. It is practically impossible to argue a negative where there is no testimony. There is nothing to discuss. What the draftsman of these articles may have had in mind, it is impossible to imagine. The charge that the respondent practiced deceit and fraud, and used threats and menaces to prevent the three persons named, "and all other persons," from testifying, reduces the entire proposition to an absurdity. "All other persons" means everybody, the members of this Court, the entire public. What is this deceit and fraud? What are these threats and menaces, of so all-embracing a character?

The fifth article charges the respondent with a misdemeanor in violation of section 2441 of the Penal Law, it being alleged that the respondent wilfully prevented and dissuaded Frederick L. Colwell, who had been duly summoned or subpoenaed to attend as a witness before the Frawley committee, from attending pursuant to said summons or subpoena, and that in so doing he acted wrongfully, wilfully and corruptly.

Section 2441 of the Penal Law reads as follows:

> "A person who wilfully prevents or dissuades any person who has been duly summoned or subpoenaed as a witness from attending, pursuant to the summons or subpoena, is guilty of a misdemeanor."

Here, again, we are called upon to argue from a blank record. There is not a word of proof, either oral or documentary, direct or circumstantial, proximate or remote, which indicates that the respondent lifted a finger or uttered a syllable for the purpose of preventing or dissuading Colwell, the only person named in

this article, from attending as a witness before the Frawley committee. When this is said, there is nothing to add.

Although there is nothing in any of the articles which relates thereto, for want of a better occasion to discuss the matter, we may now address ourselves to the testimony of Duncan W. Peck, which has been discussed through the lobbies and the corridors, and has been much heralded as the most significant piece of testimony which the impeachment managers have produced. It is not made the subject of any charge. It is not referred to in any of the articles.

It is very unpleasant and disagreeable for me to discuss this testimony, because I have known Mr. Peck from boyhood, but, however unpleasant the task may be, I shall not shirk it.

Under the ruling made by the Court, that other contributions than those specifically mentioned might be proven, Peck testified that, at the Rensselaer Inn, in Troy, at the time of the holding of a political ratification meeting before election in 1912, he met the respondent and said, "Governor, I would like to give you this for your campaign," and he thereupon gave him a $500 bill. Whereupon he received thanks, and added: "I said there were no strings on it and he need not feel at all obligated to reappoint me," referring to the fact that he was at that time Superintendent of Public Works. The examining counsel then asked:

"Q. Since that have you had any conversation with the respondent, William Sulzer, in reference to that contribution? A. That was a confidential conversation."

The members of the Court will recollect that the witness thereupon turned to the President, and, in a tone of despair, said, "Must I give it?" Whereupon the President very naturally replied, "Yes, you must give it." The testimony then proceeds:

"Q. State the conversation, first stating when it was and where it was? A. I don't know when it was. It was somewhere after the 19th of July in the executive chamber."

. . . . . .

"Q. Now, state the conversation. A. I had received a communication from the so-called Frawley committee.

"Q. A letter? A. A letter.

"Q. Have you that letter? A. No, I have not.

"Q. Have you been able to find it? A. I have not.

"Q. What is the substance of that letter?

"The President.— The point is what passed between him and the respondent.

"Mr. Todd.— If your honor please, it has to do, as I understand, with what had passed between them.

"The President.— When that appears you can go back to it.

"Q. Did you show this letter to the respondent, William Sulzer? A. I did.

"The President.— Now you can go back to it.

"Q. Will you state the substance of that letter? A. Why, it was a request to state what donation, contribution I had made; and whether a check or otherwise, and I don't remember all of it, but that was the gist of it.

"Q. To produce and give that information to whom? A. To this committee.

"Q. The Frawley committee? A. Yes, sir.

"Q. Now state the rest of the conversation. A. I showed the letter to the Governor and asked him what I could do about it.

"Q. What did he say? A. He said: 'Do as I shall; deny it.'

"Q. What else was said if anything? A. Why, I said, 'I suppose I shall be under oath.' He said: 'That is nothing. Forget it.'

"Q. Was there anything else said? A. Nothing more."

On his cross-examination he stated that he had made no memorandum of his conversation with the Governor, that he was giving the exact language, word for word.

"Q. You cannot be mistaken as to a word? A. No.

"Q. Not in a word said by him or a word said by you? A. Not that conversation.

"Q. Not a word? A. No, sir."

Intrinsically this testimony does not bear the ring of truthfulness. I will not stop to comment on the fact that he addressed

the respondent as "Governor" long before election, but will proceed to that part of his testimony which relates to his alleged conversation in the executive chamber.

He tried to impress the Court with the idea that he was loath to testify, that the conversation was a confidential one. Although he must have known that he would have to testify, he went through the mockery of appealing to the Court to protect him against divulging a confidential conversation. But as soon as the direction was given that he should answer, he proceeded forthwith to tell his strange tale. Mr. Todd, the examining counsel, seemed to be entirely familiar with it. He knew all about the alleged letter. He knew where to begin and where to stop. He was entirely familiar with all of the twists and turns of this confidential conversation. What psychic phenomenon is responsible for the transmigration from the recesses of Peck's brain into those of Mr. Todd, of this secret, confidential conversation, which Peck was shocked to narrate, and which only passed the portals of his lips when his appeal to be relieved from the betrayal of this confidence had been rudely shattered?

If Peck had not attempted this by-play, his testimony would not have so much savored of a brazen counterfeit and of hypocrisy. As it is, however, that histrionic display deprives his entire story of lifelikeness. The hesitating manner suddenly disappeared, and without prompting of any kind, he glibly proceeded with his narrative.

It is peculiar that, although the records of the Frawley committee were at the disposal of the impeachment managers, a copy of the letter which is claimed to have been written to the witness, and to have been shown to the respondent, was not produced. It is equally significant that this witness, who was so anxious to avoid the disclosure of a confidential communication, was so entirely sure of the exact language used in that conversation, that he is ready to swear that he repeated it word for word, that he was not mistaken as to a single word uttered either by Governor Sulzer or by him. Though men gifted with the most extraordinary memories are unable, after the lapse of two months, to repeat conversations word for word, this man has no hesitation in declaring his ability to do

what is practically impossible, as any member of this Court knows from his own experience.

It is also significant that this witness was not called before the Frawley committee, although it is pretended that he had been the recipient of a communication from it, and there is no explanation why he was not so called.

But contemporaneous public history affords a further reason why this testimony should be carefully analyzed, and not accepted at its face value. Peck had been appointed Superintendent of Public Works by Governor Dix. He was reappointed by Governor Sulzer. In 1912 he was ex-officio a member of the Highway Commission. He therefore had to do with the letting of highway contracts.

As Superintendent of Public Works his duties involved supervision of the canals, and of contracts made for work upon them. At about this very time Mr. Hennessy, the investigator of the public departments of the State, which included the Highway Department and the Canal Department, was unearthing irregularities of a very serious nature in both of these departments, had under examination various subordinates of Peck, and had in his possession proofs to establish his unfitness for the office which he was occupying, as well as his complicity in irregularities which were quite likely to receive ventilation before the public tribunals of the State.

Governor Sulzer was familiar with the line of inquiry which Mr. Hennessy had instituted. So was Peck. While, under the circumstances, it would have been the most unnatural thing in the world for Governor Sulzer to have made to Peck the suggestion to which the latter has testified, for Peck would have been the last man in the world into whose power he would have placed himself at that time, Peck had a strong motive for inventing such a conversation as that to which he has testified, because it would enable him to aid in the destruction of the man who had set in motion the investigation which threatened not only the office which he held, but his very liberty.

The testimony of Mr. Morgenthau when recalled, to the effect that the respondent called him upon the telephone on the evening of September 2, 1913, and asked him to be "easy" with

him, and suggested that his contribution was a personal matter, is scarcely worthy of a second thought. It was but natural in view of all the outcry that had gone forth against the Governor, and the representations that had been made concerning him, the false light in which he was sought to be placed, that he should appeal to Mr. Morgenthau not to join in the hue and cry of his enemies.

There is scarcely a man who would not, under like circumstances, make such an appeal. The suggestion that the contribution from Mr. Morgenthau was a personal one, was certainly not the suggestion of a falsehood, because Mr. Morgenthau, in so many words, testified that there was no limitation placed upon the use to which his gift was to be applied, and that he did not intend to limit him as to such use. So what is there in this conversation except to bring out the very fact that was testified to?

It is very evident that this testimony was injected into the case for the purpose of creating distrust of the Governor, of reflecting upon his honor, of casting a doubt upon his credibility; just as the testimony of the witness Allan Ryan was introduced for a like purpose — even though the testimony of neither of these witnesses possessed the slightest probative force with respect to the establishment of a single one of the articles of impeachment which have been filed against the respondent.

The impeachment managers, however, consider this a "good enough Morgan;" it is a sufficient foundation for all kinds of concoctions and theories, which pass from mouth to mouth, and grow in magnitude with every utterance; all in the hope that, however weak the evidence on the articles of impeachment may be, by some esoteric process a sentiment may be created which may accomplish, by indirect appeal, that which the evidence, upon which the impeachment is to be heard, tried and determined, does not warrant.

There remain to be considered articles 7 and 8. The first of these charges the respondent with a violation of section 775 of the Penal Law, in that he promised and threatened to use the authority and influence of his office as Governor for the purpose of affecting the vote or political action of Assemblyman Prime and Assemblyman Sweet. The section by which this charge is claimed to be governed, reads as follows:

"Sec. 775. Corrupt use of position or authority. Any person who:

1. While holding a public office, or being nominated or seeking a nomination or appointment therefor, corruptly uses or promises to use, directly or indirectly, any official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used in behalf of any candidate, officer or party or upon any other corrupt condition or consideration; or,

2. Being a public officer or employee of the State or a political subdivision having, or claiming to have, any authority or influence affecting the nomination, public employment, confirmation, promotion, removal, or increase or decrease of salary of any public officer or employee, or promises or threatens to use, any such authority or influence, directly or indirectly to affect the vote or political action of any such public officer or employee, or on account of the vote or political action of such officer, or employee; or,

3. Makes, tenders or offers to procure, or cause any nomination or appointment for any public office or place, or accepts or requests any such nomination or appointment, upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof; or,

4. Makes any gift, promise or contribution to any person, upon the condition or consideration of receiving an appointment or election to a public office or a position of public employment, or for receiving or retaining any such office or position, or promotion, privilege, increase of salary or compensation therein, or exemption from removal or discharge therefrom,

Is punishable by imprisonment for not more than two years or by a fine of not more than three thousand dollars or both."

This section can be read and reread, and twisted and contorted to one's heart's content, without disclosing that it has even the most remote application to the matters alleged in this article. Each of its subdivisions refers to the taking of money by a public officer with respect to "conferring upon any person, or in order to secure or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase in salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used in behalf of any candidate," etc. All of these provisions relate to the exercise of influence as affecting a nomination, public employment, confirmation, promotion, removal, increase or decrease of salary, of a public officer. The charges cannot be fitted to the statute, so that one can be applied to the other.

Mr. Prime testified that he had introduced in the Assembly two acts in relation to the building of highways in the counties of Essex and Warren, during the regular session, one reappropriating an unexpended balance of $750,000 for the construction of highways and the other authorizing the construction of two new State roads in these counties. Both bills passed the Senate and came before the Governor for signature. There was a question as to whether the bills were to be paid out of the $50,000,000 fund raised by the issue of bonds or out of the annual appropriation. In fact they were covered by the $50,000,000 appropriation. Mr. Prime, together with Senator Emerson and Mr. Cameron of the Attorney General's office, called upon the Governor and conversed with regard to these bills and asked the Governor to sign them. Incidentally the Governor, who was very much interested in the direct primary bill, discussed that bill with his visitors, and sought to enlist their interest in it. He casually remarked, "You for me, and I for you." The highway bills were not only passed by both houses of the Legislature, but their subject was at the Governor's request specially investigated by Mr. Carlisle, the Highway Commissioner, who approved them and upon his recommendation they were signed by the Governor on June 2, 1913, and are now chapters 785 and 786 of the Laws of 1913. The extraordinary session of the Legislature did not convene until later.

Is it intimated by our opponents that Senator Emerson and Assemblyman Prime considered themselves as being improperly approached by the Governor when he asked them to consider favorably the direct primary measure? Has the time come when the Governor may not discuss legislation of State interest with members of the Legislature, without subjecting him or them to unworthy suspicion. Is there any malign significance to be attached to the phrase "You for me, and I for you"? No promise of favorable action on the direct primary bill was given; none was exacted; it could not have been a threat that the Governor would veto the measures in which these legislators were interested. As matter of fact, without further parley and solely on the recommendation of a high official of the State, the bills became laws.

There is nothing in law or in morals which can condemn the Governor, or the gentlemen with whom he conferred, for indulging in this harmless conversation. Is there something so deterrent in the idea of a direct primary which makes it criminal for the Governor of the State, who is carrying out the behests of his party platform, to urge members of the Legislature to give to it their support? If this can be said to be an impeachable offense, then the executive officers of the Nation and of the states will find themselves in the midst of perpetual alarms, and the public service would inevitably suffer. We read from day to day the headlines in newspapers as to what is going on in regard to important state and federal legislation. Surely, if Governor Sulzer is to be convicted in this case for seeking to influence legislation, why, there are others who may find themselves in the same plight; and the most modern phase of executive activity will be found to be criminal instead of being, as generally supposed, exemplary conduct.

The testimony of Mr. Sweet is equally trivial. Here the Governor, acting in accordance with what he believed to be his duty, vetoes a bill which provided for an appropriation of the funds of the State for the construction of a bridge. In this conversation the Governor likewise referred to his direct primary bill, and asked the assemblyman how he expected to vote at the extraordinary session, to which he replied, "According to the sentiment and the interests of my district." The Governor then laid his hand on

the arm of the assemblyman, and said: "See Taylor and smooth him the right way." Taylor was the counsel to the Governor, who passed on bills which required executive action.

If this were not an impeachment proceeding such charges, instead of being seriously discussed, should evoke Homeric laughter. If this Court should consider them, assuming even for the sake of the argument that there is any permissible theory of interpretation which could make section 775 of the Penal Law applicable to this case, the communications between our future Governors and our members of the Legislature, would have to be "Yea, yea" and "Nay, nay." Anything more might mean impeachment.

The eighth article is, if possible, even more contemptible than that which has just been considered. It required a peculiar mind to frame it, and a morbid intellect to discover in the evidence adduced, a single circumstance which brings the case within section 775 of the Penal Law, under which it was framed, or the slightest relation of cause and effect between the ownership of shares of stock by the Governor and his advocacy of measures relating to the sale of securities on the New York Stock Exchange. I will not read that article. I refer you to the printed record.

In order to establish this charge there was introduced in evidence a message of the Governor urging the passage of legislation relating to the stock exchange. A number of bills were drafted under his supervision, and were introduced to carry out his recommendations. A number of them were passed by the joint action of the Senate and the Assembly. Chapter 236 of the Laws of 1913 was one of them. This amended the Penal Law in relation to bucket shops. Chapter 253 was another. It amended the Penal Law in relation to the manipulation of prices of securities and inspiring movements to deceive the public. Chapter 475 was another. That was an act to amend the Penal Law in relation to reporting or publishing fictitious transactions in securities. Chapter 500 related to transactions by brokers after insolvency in respect to the hypothecation of customers' securities.

The bills which were not passed related to various abuses which had been considered, not only by a commission appointed a number of years ago by Governor Hughes, but by a congressional

committee which had made an exhaustive study into Stock Exchange conditions.

If the Governor, in recommending this legislation, was guilty of wrongdoing, then the Legislature, in passing five of the bills which he recommended, was acting equally in hostility to the public interest, and so were the various public bodies which approved some or all of these bills.

But it is said that Governor Sulzer committed a wrong in recommending these bills, because he was the owner of shares of stock which were dealt in on the Stock Exchange. The shares of stock which it is claimed that he owned or had an interest in are those which are included in the Harris & Fuller, Boyer, Griswold & Co. and Fuller & Gray accounts. All of these represented actual, outright purchases. They were not margin transactions. They were in no sense speculative accounts. But even if they had been, what would it have mattered? Has it come to the pass when a Governor of this State has no right to be the owner of shares of stock which happen to be quoted on the Stock Exchange? Within the last twenty years we have had two Governors who were bankers and whose dealings in shares of stock presumptively were very extensive, Governor Flower and Governor Morton. Would it have been improper for them to have suggested legislation intended to regulate transactions in securities? The very formulation of a doubt is preposterous.

But, if possible, the absurdity of the contention of the impeachment managers reaches sublimity, when one considers that the only anticipated effect which regulation of the Stock Exchange and of speculation in stocks could have, would be to reduce the price of stocks. Inasmuch as Governor Sulzer is claimed to have been the holder of shares of stock which were bought and paid for, is it conceivable that he should have recommended this legislation for the purpose of reducing the value of his own investments?

I have not the patience to pursue this subject further. It is unworthy of this presence. It is an insult to the intelligence of this Court, as it is to the people of this State. Instead of recognizing this fact, the impeachment managers have not hesi-

tated to go into elaborate proof on this subject, to encumber the record with numerous exhibits, avowedly for the purpose of establishing this contemptible charge.

What is the inference to be derived from such procedure? Are the impeachment managers in earnest? Are they treating the Court with that degree of candor which one may expect in such a case as this? If they are, then it is a demonstration that, in their attempt to destroy the Governor, they have lost all sense of proportion, that they consider that everything is grist which comes to their mill, and that they evince a disposition to accomplish their ends by hook or by crook, by pandering to every prejudice, by casting forth a drag net in the hope that something may be found which will enable them to disable and disarm the Governor, whom they deliberately set out to make harmless when it was discovered that it was his purpose to be the Governor of the State, and to assert his independence in that high office.

I have now completed my analysis of each of the eight articles of impeachment. I have endeavored to deal with them, not as an advocate, but, so far as it was possible for me to do so, in the cold light of reason, in the hope that I might be able to assist this Court in arriving at a correct conclusion, both with regard to the controlling law and the evidence which bears upon the several issues which you are now called upon to determine.

I have not consciously made a statement which has not been fully borne out by the record, by public history, and by the authorities to which I have appealed for support, and now, at the completion of this discussion, I feel justified in asking for a judgment of "Not guilty" with regard to each of the eight articles.

From time to time during the progress of this trial we have heard expressions that this Court is not bound by any rule of pleading or allegation; that it can act irrespective of statute; that it is a law unto itself; that it is not bound by the articles of impeachment; that even if the respondent has not been guilty of misconduct in office, or of any crime, he may, nevertheless, be impeached on the ground of moral turpitude, or on general principles.

These expressions are the counsels of desperation, and would not be deserving of comment but for the fact that they may be symptoms of a state of mind which, if it ever enters the portals of the Temple of Justice, will portend unspeakable and immeasurable evils to the State.

Our civilization is one which is the outgrowth of law and orderly procedure. The law represents the crystalized experience of mankind. It proceeds from precedent to precedent. It is what the late James C. Carter called the "embodiment of custom;" or, as Lord Chancellor Haldane recently styled it in more philosophic phrase, it is the "expression of Sittlichkeit." To disregard these legal principles, judicial precedents, and the results of established custom would mean the reversal of the hands of Time and the eventual loss of all the blessings which civilization has secured to mankind.

It is for this reason that personally I feel the weight of the responsibility that now rests upon me. As I have already said, we are not so much concerned in this case with William Sulzer, the man, or the Governor, as we are with the supremacy of the law, with the perpetuity of its principles, with the preservation of orderly government. Our individual predilections, our partisan feelings, the satisfaction of our momentary desires, are of little moment. They are but baubles, the toys of children of larger growth. But what is of the utmost concern to every patriotic citizen, to every lover of justice and of righteousness, to every man who has aspirations for a higher life and who seeks the elimination from the world of tyranny and despotism, is that the law shall not be weakened or undermined, whatever the immediate consequence of its strict application may be.

Let there not be substituted for the rule of conduct prescribed by the supreme power of the State, the rule of judgment which may seem best suited to the accomplishment of what for the moment we believe to be the thing we desire. The result so attained will crumble into ashes in our hands, and the day of reckoning will be bitter as the waters of Marah.

There is no standard of measurement more perilous than that of the Chancellor's foot. He who is the incumbent of that office today may not be tomorrow. The reaper who follows him

who sows the noxious seeds of obsolutism, will be apt to plant another crop which will portend death and annihilation to the harmonious political system under which we have hitherto prospered and advanced.

There is no middle course; we must either steer our bark according to the accepted rules of navigation, or permit it to drift whither the wind listeth. Unless there be a pilot to guide it, unless it proceeds according to the chart of experience, shipwreck will be inevitable. It is for this reason that I conjure you not to be swerved from the path which the law has marked out for the guidance of your footsteps; that you do not lend ear to those who prate in glittering generalities; and that you do not follow the will-o'-the-wisps which lure one into the noisome bogs of anarchy. Let the law be the Polar Star which now, as in the past, points out the way to safety.

Upon your decision rests not the future of William Sulzer, but the happiness of future generations. Shall ours be a government of laws, or one of passion and caprice? It is my fervent prayer that the decision to be rendered here will not leave the answer in doubt. Though life is sweet, may I not live to see the day when the law shall cease to be paramount in our daily lives and in our system of government!

## Power of Court to Amend the Impeachment Articles.

Mr. Marshall.—May it please the Court: To my mind, the attitude taken by our opponents on this argument is virtually a plea of bankruptcy, so far as the fourth article of impeachment is concerned. It is practically an admission that that article is insufficient to warrant a verdict of guilty as against this defendant; and that is demonstrated by the fact that counsel come here, in cold blood, and present to us an entirely new article in lieu of article 4, one which cannot be recognized as in any way based upon the same provision of law, or upon any of the facts set forth in the original article. They have virtually taken a poodle dog and cut off his head and tail, his fore legs and his hind legs, and are seeking to substitute other tissue and to make of it a wolf.

They have cut out every allegation which brings the case under section 814 of the Penal Law, and have substituted new allegations to make a case under section 813. And, forsooth, they say there is no difference between sections 813 and 814, although the language of the two sections is entirely at variance and differs fundamentally.

It is a remarkable suggestion to intimate that the Legislature of this State sat down deliberately, with the aid of the lawyers who framed the criminal law of a great commonwealth, and repeated in section 814 what had already been formulated in section 813. I had always supposed that it was a maxim of interpretation, a well-recognized principle of law, that the Legislature is not supposed to do a vain or useless thing, or to indulge in needless repetition, especially in respect to so important a statute as the Penal Law.

My friend comes here and disavows any intention to amend the articles of impeachment. He practically recognizes the fact that this Court has no power to formulate new articles of impeachment,

but then he proceeds with an attempt to do that very thing, by substituting an entirely new article of impeachment upon the pretense that this is not a criminal proceeding, and, therefore, section 723 of the Code of Civil Procedure applies; or, even if it is a criminal proceeding, that section 293 of the Code of Criminal Procedure applies; or, if it is neither fish, flesh nor good red herring, that both apply. Consequently the impeachment managers assert the right to change their case at the very moment of judgment, after all the evidence has been concluded, and to substitute for the issue which we have been called upon to meet, an entirely different one.

As to whether this is a criminal proceeding or not, I shall rest upon the argument which I have already made on that point. All that I desire is once more to call attention to the authorities which I collated on that subject in my final argument. They go into detail — I was about to say to such an extent as to tire the Court, but, in view of the fact that so great a lawyer as my friend Mr. Stanchfield, at this late date, takes issue upon the proposition, I find that perhaps I have not done amiss in multiplying the citation of authorities.

I call especial attention to the language of Chief Judge Church at page 2070 of volume 3 of the Barnard trial, where he says: "But we are here in a criminal case," defining a case of impeachment as a criminal case. The question suggested for argument relates to the power of the Court to amend the articles of impeachment so as to include the acts testified to by Peck, Morgenthau and Ryan. We insist that no such power of amendment exists, and that an attempt to exercise it would be a violation not only of section 13 of article 6 of the New York Constitution and of section 1 of article 6 of that Constitution, but of the 14th amendment to the Constitution of the United States as well.

The right to impeach, to present and formulate articles of impeachment, is vested in the Assembly alone. This Court can only hear and determine charges presented by the Assembly. It cannot usurp any of the functions of that body. To do so would deprive the respondent of his liberty and property without due process of law. It would forfeit his office and its emoluments. It would forever take from him the right and privilege of hold-

ing office, a right vested in all male citizens of the State not convicted of crime.

For these reasons we at this time solemnly object and protest against any amendment of the articles, as violative of the New York State and of the Federal Constitution.

Article 6, section 13 of the Constitution declares:

> "The Assembly shall have the power of impeachment by the vote of a majority of all the members elected."

This tribunal is constituted only for the trial of an impeachment duly voted, and is without other jurisdiction. As stated in section 12 of the Code of Criminal Procedure:

> "The Court for the Trial of Impeachments has power to try impeachments, when presented by the Assembly."

By section 17 of that code it is provided:

> "Upon the delivery of an impeachment from the Assembly to the Senate, the president of the Senate must cause the Court to be summoned to meet at the Capitol in the city of Albany on a day not less than 30 nor more than 60 days from the day of the delivery of the articles of impeachment."

Section 18 continues:

> "At the time and place appointed and before the Court proceeds to act upon the impeachment, the clerk must administer 'the oath or affirmation' duly and impartially to try and determine the impeachment."

What impeachment is referred to? That voted by the Assembly and no other.

Section 118 of the Code of Criminal Procedure enacts that when an officer of the State is impeached by the Assembly the articles of impeachment must be delivered to the president of the Senate.

Section 119 then states:

> "The president of the Senate must thereupon cause a copy of the articles of impeachment with a notice to appear and answer the same at the time and place appointed for the

meeting of the Court, to be served on the defendant not less than twenty days before the day fixed for the meeting of the Court."

By section 120 it is declared that service must be upon the defendant personally, and if he cannot on diligent inquiry be found in the State the Court may order publication to be made of a notice requiring him to appear at a specified time and place and answer the articles of impeachment.

It is thus shown beyond cavil that the Assembly alone possesses the power to impeach and formulate articles of impeachment, and that this Court is confined to the articles of impeachment served on the respondent, and that it cannot convert its status and jurisdiction from that of judge to that of accuser, the two functions being separate and independent and inconsistent. It would be most extraordinary if, at the close of a long trial of articles of impeachment voted by the Assembly, the Court could amend the articles by adding a new charge depriving the respondent of the right to be heard and the time for preparation which under the law he is accorded with respect to the charges voted by the body which is the constitutional accusing body.

Authority is not wanting to sustain our contention that the power to amend is vested neither in this Court nor in the impeachment managers, but resides solely in the Assembly acting by a majority of all the members elected thereto.

This same question arose in Leese v. State, 37 Neb. The same case is reported in 20 Lawyers Reports Annotated, page 579. Although five weeks ago, at the beginning of this trial, I cited this case, in my opening argument, still in view of the time that has elapsed and the fact that my friends do not seem to have been impressed by the authority, I shall presume upon the patience of this Court once more to read that decision, since its reasoning seems conclusive on the point which we now have under consideration.

That was a case of impeachment. Under the Constitution of the state of Nebraska the power of impeachment is vested in the two houses of the Legislature in joint convention, and the impeachment is then heard and tried before the judges of the Supreme Court of the state. In that case the Legislature of Nebraska adopted and presented to the Supreme Court articles

of impeachment against William Leese, ex-attorney general, charging him with misdemeanors in office during the period of his attorney generalship. Within the time fixed by the court the respondent answered the articles of impeachment exhibited and presented against him and to each and every specification. Subsequently the managers appointed by the Legislature to prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in the articles of impeachment to which proposed amendments the respondent objected. At the hearing, the application to file amended specifications was denied. After citing the provision of the Constitution of the State to which I have referred, the Court proceeds to state the following reasons for its conclusions:

> "By the foregoing provision the exclusive power of impeachment is conferred upon the Legislature. Both houses of that body are required to meet in joint convention to act upon a resolution to impeach a state officer for any misdemeanor in office, and such a resolution can only be adopted or carried by the affirmative vote of at least a majority of all the members elected to the Legislature. The authority thus given carries with it the power of the Senate and House of Representatives, under like restrictions to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the Legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter, or amend one which has been duly passed, and in neither case does the right exist.
>
> "Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to permit the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court, no amendment of the instrument in matter of sub-

stance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indictment." Citing a number of cases, including People v. Campbell, in the 4th of Parker's Criminal Reports at page 386, and the great case of Ex parte Bain, 121 U. S. 1; also decisions from Alabama, Mississippi, North Carolina and Wisconsin.

"We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeachment exhibited against the respondent. If they could do that, it necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent, not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the Legislature, might have rejected, had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the Constitution.

"In reaching the conclusion stated above, we have carefully considered and given due weight to the last paragraph of the articles of impeachment, which reserves to the Senate and House of Representatives of the State of Nebraska, in joint convention assembled, 'the liberty of exhibiting at any time hereafter any further articles or other accusations or impeachments against the said William Leese, late Attorney General of the state of Nebraska.' All that can be reasonably claimed for this provision is that the joint convention of the two houses of the Legislature reserved the right to adopt other and additional articles of impeachment against the respondent. But the Legislature has not preferred other or further accusations against him, nor does the clause above mentioned attempt to confer such authority upon the managers of impeachment. If it had done so, as we have already seen, it would be repugnant to the letter and spirit of the Constitution."

The case which I have just cited as well as many others which have been referred to in the course of the trial show that impeachment proceedings are in fact criminal proceedings. The same rules of procedure and of evidence apply to both. Articles of impeachment are the equivalent of an indictment, and while perhaps not so strictly construed, the essential characteristics are the same, and the fundamental principles governing them are identical. For that reason the authorities which bear on the right to amend indictments are equally applicable to the amendment of articles of impeachment. That was expressly decided in State v. Leese.

In fact the authorities on which the court proceeded were cases relating to the amendment of indictments.

I might here say a word with regard to the discovery which counsel has made that this cannot be a criminal proceeding because of the provision in section 6 of article 1 of the Constitution that one cannot be twice placed in jeopardy. Well, that is very true unless the Constitution makes an exception. But in this particular case the Constitution makes an exception because it does permit an indictment as well as an impeachment and resort to one of those remedies is not considered to preclude the pursuit of the other.

There is also the provision of the Constitution that a man shall not be compelled to be a witness against himself. That certainly is applicable to these proceedings as are all the other safeguards of the Constitution and the laws, including the rule that no argument shall be made commenting upon the failure of the defendant to testify in his own behalf. I have heretofore called attention to the fact that "impeachment" is used all through the Constitution in juxtaposition with the phrase "crime or crimes, or offenses," both with respect to indictment, as well as with respect to pardons, reprieves and commutations.

The case of Ex parte Bain was one where an indictment charged the offence of making a false report to the Comptroller of the Currency with the statement that it was with the intent to defraud the Comptroller of Currency. Upon the trial it was sought to amend the indictment by striking out the words which charged deceit of the Comptroller of the Currency. The motion was

granted, but the Supreme Court of the United States declared that such amendment deprived the proceedings of all validity. It deprived them of the character of due process of law, and it therefore discharged the prisoner upon a writ of habeas corpus, on the ground that the indictment could not be amended, even in that rather unimportant particular.

It was decided in this State in People v. Campbell in 4 Parker's Criminal Cases 386, that an indictment which charged one with stealing a dog could not be amended so as to describe the dog as a tame dog as distinguished from one ferae naturae, even though that amendment was with the consent of the defendant. A conviction upon the amended indictment was accordingly set aside. That decision has been approved and treated as a leading case in various states as it was in Ex parte Bain.

Although section 293 of the Code of Criminal Procedure was enacted as a statute of jeofails, it relates exclusively to matters of form and not to those of substance. It relates to the ordinary variances in description, or in names, where names and description are not of great moment, but it does not permit a change of allegation as to the essential nature or character of the crime, or the addition of allegations of another crime, or the substitution of a crime of a different nature for the crime alleged. It has already been read here, and is as follows:

> "Upon the trial of an indictment when a variance between the allegations therein and the proof in respect to time or in the name or description of any place, person or thing shall appear, the court may, in its judgment, if the defendant cannot be prejudiced in his defense on the merits, direct the indictment to be amended according to the proof on such terms as to postponement of the trial, to be had before the same or another jury, as the court may deem reasonable."

In speaking of similar legislation it is stated by various authorities which are found in the 22d volume of the Encyclopedia of Law and Procedure under the title "Indictment and Information," at page 434, that courts cannot permit the amendment of an indictment as to matters of substance, for as amended it would not be the finding of the grand jury.

The Court of Appeals, as has been shown in the argument of Judge Herrick, has recently had occasion to pass upon this very statute and the limitations upon the power of amendment so far as they have been conferred by the statute.

The case of People v. Geyer, in 196 N. Y., has been referred to. In that case the indictment, as it was framed, charged larceny under subdivision 1 of section 1290 of the Penal Law because it alleged the wrongful taking of a check. The amendment that was made changed the offense to one under subdivision 2 of section 1290 by alleging that it was the money which had been collected upon that check, and which had been deposited by the person who had collected it and who thereafter took it out of the account to the credit of which it had been deposited, thus creating the offense of embezzlement as defined in subdivision 2 of section 1290. Yet, although both crimes were defined in one and the same section, the court held that there could not be an amendment.

Now, our friends come here and say you can eliminate the crime which is charged in section 814 and which is described in the articles of impeachment in the very language of section 814, and substitute therefor a crime which is set forth in an entirely different section, section 813, in different language, and with different attending circumstances.

My associate omitted to call attention to the case of People v. Bromwich, reported in 200 New York 385, which is a most admirable illustration of the limitations which the Court of Appeals has recognized as imposed upon section 293 of the Code of Criminal Procedure. For the court recognized that if section 293 undertook to extend the power of amendment to such an extent as to substitute the description of one offense for another, it would be in violation of the Constitution which requires the presentment by a grand jury as the condition precedent to a criminal prosecution. It would be absolutely in violation of our Constitution, as in the Bain case it was declared that such an attempt to amend would be in violation of the Federal Constitution.

Reading from the opinion in that case, which is quite brief and which very clearly indicates how the Court of Appeals

views this section, we find the following, and it is the decision of a unanimous court:

"The defendant was indicted and convicted for the crime of false registration in appearing before the inspectors of election for the fifteenth election district of the thirty-first assembly district in the county of New York as a voter in such district, he not being a qualified voter in such district, nor a citizen of the United States or of the State of New York, nor an inhabitant of such election district for the last thirty days preceding the date of election. On this indictment he was tried and convicted of the offense and the Appellate Division reversed the questions of law and found no error, without having examined the facts therein. The first error of which the defendant complains is that on the trial the prosecution was allowed over his objection and exception to amend the indictment by inserting the thirty-fifth assembly district in lieu of the thirty-first assembly district wherever the words appeared therein. The learned judge who wrote for the majority of the Appellate Division was of the opinion that the amendment was authorized under section 293 of the Code of Criminal Procedure. We entertain a different view. While the indictment contains but a single count, the defendant is alleged to have violated the law and been guilty of a crime for two different reasons. First, because he was neither a citizen of the United States nor of the State of New York. Second, because he was not an inhabitant of the election district thirty days previous to the date of election. Under the first allegation the defendant would be guilty of the crime no matter in what election district he registered, and had the indictment contained this single allegation the amendment would clearly have been justified under the provisions of the code quoted. The statement of the election district would not be any element of the crime, but a mere specification of the particular place in which the crime was committed. Not so, however, as to the second allegation of the indictment. There the crime charged is that the defendant registered at a particular election district

where he was not entitled to vote because he was not an inhabitant of that district. The particular district in which the registry was obtained was an essential element of the crime. The grand jury have not found that the defendant was not an inhabitant of the thirty-first district, which was necessary to constitute a crime under the amendment of the indictment. In other words, the amendment is not merely in the description of the defense, but in the identity of the offense. An amendment by the court is not permissible."

I also call attention to the case of People v. Poucher, in 30 Hun, at page 507.

If an amendment to an indictment such as I have just indicated, namely, one merely changing the number of the election district, was under the circumstances narrated beyond the power of the court, how is it possible in this case to permit such an amendment as has been suggested?

Suppose we were now trying this case before a court and jury under an indictment framed as article 4 was originally drawn, and my friend should then come before the court and ask to amend that indictment in accordance with the allegations which he has read to your Honors this afternoon?

Is there anyone here who would for a moment suppose that any court would listen with equanimity or patience to such a suggestion? If he were occupying the position of counsel for the defendant in such circumstances, I can imagine the volume of eloquence which would be urged against the outrageous suggestion and the picture that he would paint of injury to the cause of justice if such an application as he now makes were granted, and he would be entirely right if he voiced his indignation.

These decisions are in accordance with the underlying principles of justice, without which it would be but a tinkling of brass.

One charged with malefaction must first be informed of the precise nature of the charge which he is to meet; he must be accorded opportunity for investigation and for preparation, and to determine upon the course of action which he is to pursue. Legal decisions would become "springes to catch wood-cock withal" if when one were cited in court to meet a charge of larceny he

could be compelled to go to judgment on a charge interpolated at the twelfth hour of subornation of perjury, conspiracy, embracery or whatsoever other ground man may devise. It would be but an introduction into our jurisprudence of the ancient fable of the wolf and the lamb.

That the present articles are insufficient to admit of action by this Court with respect to the matters referred to in the testimony of Morgenthau, Peck and Ryan scarcely requires argument.

Without repeating the propositions which were referred to in my main argument as to the nature and sufficiency of the fourth article, framed as it avowedly is, under section 814 of the Penal Law, which it seeks to follow in haec verba, there is nothing in the evidence which indicates that the respondent practiced any deceit or fraud, or used any threat, menace or violence as against Morgenthau, Peck or Ryan to prevent them from testifying or disclosing any material fact in any suit or proceeding.

Certainly the words "deceit and fraud" are to be used in the same relation as the words "threat, menace or violence." They are words ejusdem generis, and therefore clearly refer to action affecting the person whose testimony is sought to be suppressed.

I will not now discuss the serious question as to whether this is an action or proceeding within the meaning of section 814, or whether the hearing before the Frawley committee was such an action or proceeding. The decision of the Court of Appeals in the Matter of Droege, 197 N. Y. 44, would seem to indicate that it was not. I take the broad ground that the testimony referred to does not establish an offense under section 814, even if it might be argued that it does come within section 813, but that would not enable the court to consider that testimony as establishing a substantive charge under that section, if, for no other reason than because the articles of impeachment in no manner refer to any violation by the respondent of section 813, and have not given him due notice such as constitutes due process of law, so far as a charge of violating section 813 is concerned.

If the facts testified to by these witnesses indicate the commission or the purpose to attempt to commit any illegal act, it is that set forth in section 813 of the Penal Law, or in section 580 of that statute, although it is scarcely necessary for us in connection

with this argument, to disclaim any such purpose or intent, or to debate the truth of the matters as to which testimony has been given.

It appears at a glance that these offenses are entirely different and distinct from those set forth in section 814 and described in the fourth article of impeachment. Incitement to perjury and the giving of false testimony is a totally different offense from practicing fraud, deceit and using threats, menaces, or violence against those whose evidence is sought to be suppressed in an action or proceeding.

This would be the first time in a case of impeachment, than which no judicial inquiry can be more solemn, and none should be more hedged about with protective safeguards, that so revolutionary a method of procedure as that proposed would be adopted. It would make what is popularly known as "railroading" an innocent pursuit. There would be no precedent for it in criminal proceedings under a government which protects even the meanest criminal and affords him the guaranty of due process of law. Not even an habitual criminal can be deprived of the right to be tried on a regularly formulated charge, and none other. Not even in a civil action where less stringent rules of procedure apply, would such a contention as that which is now made be tolerated.

Our friends claim that this case is governed by section 723 of the Code of Civil Procedure, and that the Court can now conform the pleadings to the proof by changing the allegations upon which we were called to trial and substituting entirely different ones. To show that they have not read the authorities to advantage, I will now cite a number of decisions in civil actions which indicate that the rule is not as they claim it to be. In fact the rule is just the converse. It is that on a trial it is not permitted to change the character of the action under consideration or of the charge that is made against the defendant therein. A change in the nature of a cause of action or the theory upon which it proceeds is forbidden.

In Southwick v. First National Bank of Memphis, 84 N. Y. 429, Judge Earl said:

> "Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one

cause of action and then recover upon another his complaint will serve no useful purpose but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise and when he came to trial he was held liable not for any breach of promise but for the money paid by a Boston firm on the ground of a conversion of the draft or a mistake of facts which induced the payment of the money."

In Day v. Town of New Lots, 107 N. Y. 148, Chief Judge Ruger said:

"The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, secundum allegata et probata, is fundamental in the administration of justice. (Citing Wright v. Delafield, 25 N. Y. 266.) Any substantial departure from this rule is sure to produce surprise, confusion and injustice."

In Romeyn v. Sickles, 108 N. Y. 650, the action was brought to recover on a quantum meruit for work, labor and services by the plaintiff as an architect in preparing plans for a proposed building. The answer set up a special contract under which it was claimed that the work was performed, which tended to show that the defendant and others were interested in forming a club which was to pay for the plans if the building was erected, otherwise the plaintiff was not to be paid. The plaintiff was awarded judgment by the referee on a theory not set forth in the complaint. The judgment was reversed by the Court of Appeals. Chief Judge Ruger, after quoting from the opinion wherein the referee remarked, "It is true that upon this view the plaintiff recovered upon a somewhat different cause of action from that stated in the complaint," followed by the suggestion "that the pleadings may be amended or deemed amended to conform to the proof," made the following comment: "This is to ignore the whole office of a pleading and compel parties to try their cases in the dark, informing them for the first time after the wrong is irremediable of the issue which they should have tried. The plead-

ings were not amended and they could not lawfully be amended in a material respect except at a time which would give the party against whom the amendment is allowed a right and opportunity to meet by proof the allegations made against him."

In Bourke v. Truesdell, 145 N. Y. 612, it was held that where fraud is alleged as the basis of an action it must be proved, a recovery may not be had on proof of a right of action on contract or of some other character, although facts are proved which in a proper form of action would justify the recovery. I cite a great many other cases to the same effect, including the great case of the People v. Denison, 84 N. Y. 272; De Graw v. Elmore, 50 N. Y. 1; Ross v. Mather, 51 N. Y. 108; Salisbury v. Howe, 87 N. Y. 128; Barnes v. Quigley, 59 N. Y. 265; Reed v. McConnell, 133 N. Y. 434; Doyle v. Carney, 190 N. Y. 386.

I call especial attention to People v. Bremer, 69 App. Div. 14; 173 N. Y. 599. There an action was brought to recover penalties, it being charged in the complaint that the defendant sold imitation butter. On the trial it was sought to amend the complaint by adding the allegation "as butter," so that the offense was changed from a sale of imitation butter to one which constituted a sale of imitation butter as butter, an entirely different act. It was held that such an amendment was not permissible.

I could cite a large number of other authorities, all of which are to the effect that even in a civil action, not, as in the present instance, a proceeding which involves forfeiture of office, which may impose a perpetual stigma upon the name of the defendant, a proceeding which involves a deprivation of the dearest rights that man can have in a free republic, the courts will not permit an amendment which makes a substantial change in a cause of action at the trial.

The testimony of Morgenthau, Peck and Ryan was not received for the purpose of establishing a substantive ground of impeachment, but solely for evidentiary purpose, as bearing on articles 1, 2 and 6. Each of them testified to making payments to the respondent in October, 1912. Under the ruling of the court, that evidence was received, subject to objection, as bearing on the scienter of the respondent. The witnesses then gave the additional testimony which has been recited on the argument.

That was allowed on the doctrine of Nowack v. Metropolitan St. Ry. Co., 166 N. Y., as tending to cast doubt on the respondent's position, so far as it related to the charge contained in articles 1, 2 and 6, or any other article as to which evidence was given. The reasoning by which the admission of such testimony has been justified is that contained in the opinion by Judge Vann, which was quoted by Senator Brackett in his closing argument, and which has been read this afternoon by Judge Herrick.

It is merely that such testimony is competent as possibly indicating a consciousness of guilt or of wrongdoing, and in that sense may have a bearing upon the credibility of a party who uses the methods referred to, or may affect the general credit of his case.

It is merely evidentiary; it may or not be persuasive as to the credibility of the respondent or the effectiveness of his defense to the charges which are on trial. It certainly cannot be the basis of an independent right of recovery in a civil action, or of conviction in a criminal proceeding. Thus, the fact of flight, or an attempt of a prisoner to escape before trial, is receivable in evidence merely as tending to establish the consciousness of guilt, surely not as the basis of a conviction. Hence, if one were charged with larceny — and such a case was instanced in the opinion of Judge Vann in the Nowack case as the classic illustration for the admissibility of such testimony — and evidence of flight were admitted, it would not warrant a conviction for any crime other than that of larceny, even though an attempt of the prisoner to escape was in itself an indictable offense.

And so if the charge were perjury, while evidence of the forgery of the prisoner's books might in a possible aspect of the case be admissible, it would not warrant a conviction for forgery, even though the charge of perjury could be maintained because the statutory essentials of the crime had not been proved.

So, in the present case, we contend that articles 1, 2 and 6 do not present proper grounds for impeachment, because they do not set forth "wilful and corrupt misconduct in office," because they do not refer to official acts, but at most to the acts of a candidate for office, completed nearly two months before the respondent's official term began. While under the reservation of this Court of the decision as to the sufficiency of these charges,

until it votes on the question of acquittal or conviction, the evidence now under consideration may have been admissible in its bearing on the charges contained in articles 1, 2 and 6, if these articles fall because of want of jurisdiction, the evidence given in their support falls with them, and cannot be made the basis of an independent charge; and this is equally true with respect to all the other articles. If there is no evidence to sustain them, all the evidence of impropriety or indiscretion, or of other offenses that may be presented, will not afford ground for conviction.

It is shown in 1 Wigmore on Evidence, section 278, that such evidence as that now under discussion is merely collateral and does not establish a substantive crime. It is evidentiary of an existing issue and not creative of a new one. It performs a probative function with respect to an actual charge presented by the pleadings. It does not give rise to independent action, outside and beyond the pleadings.

As illustrative of the idea that this was a collateral matter, let me call your attention to an important ruling made by the court. Your Honors will recollect that one of the last witnesses whom we called was John A. Hennessy. We tried to show by him various acts of Peck while he was Superintendent of Public Works and a member of the Board of Highway Commissioners, as indicating that he had a motive to testify as he did with respect to the respondent. When that evidence was offered it was ruled out, and, in sustaining his ruling, the President said, after the following explanation by Mr. Hinman of his purpose in offering the testimony:

> "The evidence we claim will tend to show and will show that Duncan W. Peck had an interest in this proceeding here now, and had a motive for testifying in such a way as would eliminate this respondent from office and stop this investigation.
>
> "The President.— I do not see how you can go into that. That will involve an entirely collateral issue. It seems to me — of course, the Court has already announced it is disposed to rule very liberally on both sides as to testimony, but there does seem to be some limit, so the Court cannot go

beyond that and wholly ignore the rule of the Court. If you can show expressions of hostility or personal hostility to the defendant here, that is original evidence, but anything that discredits the witness generally you are confined to getting out of his own mouth."

Therefore, this testimony, bearing upon the credibility and the motive of Peck, was ruled out as collateral, because we did not first cross-examine him upon those points. For that reason we were not allowed to go into affirmative proof upon that subject. According to our opponents' contention, however, they may convert into a substantive claim against us, the charge that we have been guilty of a crime under section 813, in attempting to incite the witness Peck to commit perjury. And yet the Court holds that we cannot go into proof to contradict this man, to show his motive, and to prove that his testimony was false, by circumstantial evidence, because it is collateral. Hence we find our lips sealed, we are precluded from defending ourselves, from going into evidence upon that subject; and our friends here, at the latter end of the day, after the twelfth hour, are privileged to come here, or at least seek to come here, for the purpose of converting this case into an entirely different one from what it has heretofore been considered by this Court, and of converting into a substantive cause for impeachment a matter as to which his Honor, the President, has held, this Court sustaining the ruling, that it is but a collateral matter. Certainly if this is a matter of substantive right, certainly if it is a substantive charge, then it would be most extraordinary if we were tied hand and foot and were precluded from going into proof with regard to it, although our friends now claim it to be of the utmost moment. Why, they have gone so far as to say that this is subornation of perjury, a felony which is punishable by one-half of the punishment which is to be accorded to one who has committed the full-fledged crime of perjury; and yet they assert at the same time that this is not changing the cause of action or the nature of the charge pleaded in the fourth article.

Counsel's argument confounds his contention, refutes everything that he has said.

Even when properly admitted, such evidence as that of Peck is not conclusive with respect to the charges to which it is addressed. That is well shown by Judge Vann in the Nowack case. It is also well expressed in 4 Elliott on Evidence 2724, where, speaking for illustration with reference to evidence of flight, the author says:

> "Proof of flight does not of itself, apart from the motive, necessarily cause any presumption of guilt, but the motive may be inferred from circumstances, and flight to avoid arrest, etc., is a circumstance to be considered along with the reason which prompted it, together with the other evidence in the case, and may lead to the inference of guilt."

This is strongly sustained by authoritative decisions: Ryan v. People, 79 N. Y. 593; Hickory v. U. S., 160 U. S. 408; Alberty v. U. S., 162 U. S. 499.

In the present case it may also be useful in passing to comment on the fact that a different rule of evidence applies to the establishment of a charge of perjury or subornation of perjury, from that applicable to section 814 of the Penal Law, for as to the former crimes it has been decided in People v. Evans, 40 N. Y. 1, that they cannot be sustained by the evidence of a single uncorroborated witness.

On the general subject of proof of other offenses, even as bearing on scienter, it may be well for this tribunal to ponder the latest decision of the Court of Appeals on that subject — People v. Pettanza, 207 N. Y. 562 — which has been fully referred to in the argument of Judge Herrick. But without prolonging this argument, we contend that to convert testimony received for evidentiary purposes into a substantive charge, and to consider it ground for impeachment, either under the articles as framed by the Assembly or under an amendment permitted by this Court, would deprive the respondent of due process of law, and would utterly obliterate all the landmarks of the law, a possibility the mere contemplation of which makes one shudder. And I merely ask your Honors, in conclusion, to compare the charge as it is set forth in the fourth article of these impeachment articles, as found by the

Assembly and as presented at the bar of the Senate and as served upon the respondent, and as to which he was invited to go to trial, with this altered, changed, amended article 4 which states an entirely different cause for complaint. The mere putting them in juxtaposition in deadly parallel columns must forthwith settle the question now under discussion.